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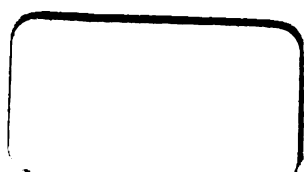
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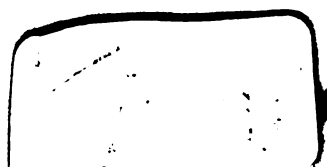
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Joseph Brinkley

R E P O R T S O F C A S E S

IN THE REIGNS OF

Hen. VIII. Edw. VI. Q. Mary, and Q. Eliz.

TAKEN AND COLLECTED BY

Sir JAMES DYER, Knt.

SOME TIME

CHIEF JUSTICE OF THE COMMON PLEAS.

NOW FIRST TRANSLATED,

WITH ADDITIONAL REFERENCES TO THE LATEST
BOOKS OF AUTHORITY,

MARGINAL ABSTRACTS OF THE POINTS DETERMINED IN EACH CASE,

AND AN

ENTIRE NEW INDEX TO THE WHOLE,

BY

JOHN VAILLANT, M.A.

OF THE INNER TEMPLE, BARRISTER AT LAW.

To this EDITION a LIFE of the AUTHOR is prefixed;

AND

From an ORIGINAL MANUSCRIPT in the LIBRARY of the INNER
TEMPLE several NEW CASES of his are introduced in the NOTES.

IN THREE PARTS.
PART I.

L O N D O N :

SOLD BY J. BUTTERWORTH, FLEET-STREET

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1794

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LAW DEPARTMENT.

TO THE HONOURABLE

Sir *FRANCIS BULLER*, Bart.

ONE OF HIS MAJESTY'S JUSTICES OF THE COURT
OF KING'S BENCH.

SIR,

WHEN the Intention of this Publication was first made known to you, I had not the Honour of your Acquaintance; but it is impossible I can forget the obliging Readiness with which it was immediately received under your Patronage, or omit thus publicly to declare with how much Gratitude and Respect

I have the Honour to be,

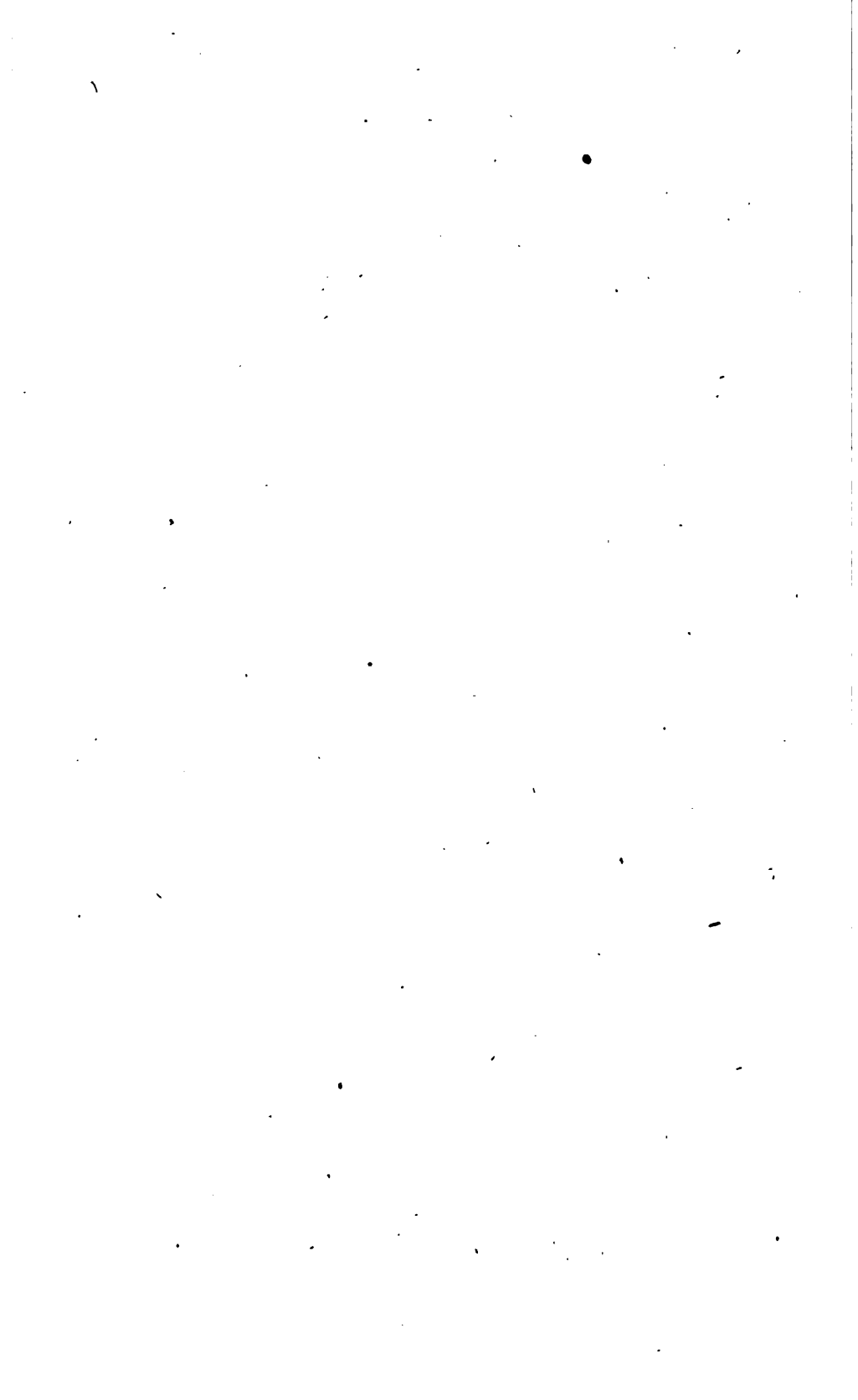
SIR,

Your most Obedient,

And very Humble Servant,

KING'S-BENCH WALKS,
INNER TEMPLE,
OCT. 1, 1793.

JOHN VAILLANT.



ADVERTISEMENT

TO

THIS EDITION.

THE high repute in which these Reports of SIR JAMES DYER have been always held, and the estimation of the marginal Notes which were added by LORD CHIEF JUSTICE TREBY to the Edition of 1688, render any eulogium from me unnecessary. I shall therefore content myself with stating what I have attempted in the present Edition; and as the Original is faithfully preserved throughout, whatever I have added being carefully marked and kept distinct from that, at least the book cannot have lessened in value by my labors, though they should prove fruitless: -

*See 2 Term
Rep. 84.*

For the purpose of translation, and on account of the numerous errors crept, through the negligence of former Editors, into the Text, and most religiously preserved and car-

ADVERTISEMENT

ried on, without the least attention to sense, through all the subsequent ones, each in his turn copiously contributing to encrease the stock, I have endeavoured to procure all the Editions to compare and discover them. The earliest Edition I have been (a) able to obtain is that of 1592, being the second, which is in the Library of the Middle Temple, and with the use of which I was favoured by that learned Society. This I have carefully collated throughout with the Edition of 1688; a labor very essential, as I have found whole lines omitted, by which the sense was frequently obscured, and sentences so altered, that the meaning was sometimes wholly perverted. These I have faithfully restored, and noted; and by that copy flatter myself that almost every error in the Book is done away.

If there remain any which greater knowledge or more successful exertions might have

(a) Since this Work has been nearly all printed off, I have met with an Edition of 1585, but it came too late to be of any service, and that of 1592 seems very correct; I think it, however, incumbent upon me to state, that an alteration which I have made from the Edition of 1592, in fol. 25. b. pl. 159., for which see note (a) to that pl., is not warranted by the Edition of 1585, which is *iffint que il poyt fire et ad uite*: the Edition of 1601 agrees with that of 1592.

avoided,

TO THIS EDITION.

avoided; I must submit to such blame as they deserve; I can only declare that pains and attention, which must depend on me, have not been spared; and how great is the actual and tedious labor of translating, collating, and transcribing, they only who have engaged in similar undertakings can know. Any apology which might be expected for the seeming negligence of style must be found in the fidelity of the Translation.

I HAVE added by the side, at the head of the references, (as is the modern practice), an abstract of the points in each case; and put down every book in which I could find the same case reported. Where cases which are here anonymous are reported in other books by name, and so clearly that there remained no doubt but that they were the same, I have called the case in DYER by that name to facilitate the finding it in future. Though few of the names of the cases cited in the marginal notes are spelt like those of the same cases in the books where they are reported at length, I have not generally altered them; yet having given the pages of those other Reporters, it is easy to see that they are the cases intended. It sometimes happens

ADVERTISEMENT

that a case is not strictly the case of that person by whose name I have nevertheless called it ; but as I found it known already in most of the law books by that name, and not by its right name, I judged it proper to preserve it : as *Chycke's Case*, fol. 357. pl. 44. should be *Ludlam's Case*, or rather *Baker v. Raimond*, see 1. And. 51. S. C.

I HAVE generally rendered into English the extracts of deeds, writs, and quotations, where the question did not turn upon the tense of a verb, or the peculiar meaning of the Latin word used, and for which perhaps we have no word exactly commensurate in our tongue ; whenever that has been the case, I have scrupulously preserved the original.

WHERE words are added which were not in the Edition of 1688, and which are not between crotchets [], the Reader may depend that they were in the Edition 1592, from which I have silently made the correction : sometimes the omission has been of importance, but often not so : to continue such omission, however, would be incorrect.

WHERE

TO THIS EDITION.

WHERE I have been able to find the cases cited in the body of the work, or in the margin, I have inserted the books where they are reported, with the pages immediately after the name, nevertheless carefully distinguishing my interpolations from the work itself, by placing such insertions within crotchets, for all of which I alone am answerable. Where my utmost diligence has not been able to discover them in any Reporter extant (for reports are cited in the notes which were, I imagine, in *MS.* and well known at that time by the names of TANFIELD, WARBERTON, HARPER, TURNER, RANDAL, MASON, and RHODES,) I have marked them with a flower thus †. . . If any quotation by folio is not marked, or any other folio inserted in crotchets, it is because upon examination I have thought it the passage intended to apply; I say *intended*, for it sometimes happens that the application is very remote, and as the misquotations are extremely numerous, one might almost be tempted to suppose *that* also an erratum. So where among the marginal notes, the point for which alone it was cited could not be found, though a case of the same name and Term is reported elsewhere, I have for the most part put a † as unable to find it; and where a book

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put my own references as nearly opposite to the words which they are meant to illustrate as conveniently could be done ; where they are not exactly so, the application notwithstanding will be readily found.

IN addition to the Cases which the former Editors have published, I have given some others which were collected by SIR JAMES DYER, the manuscript of which is in the Inner Temple Library. The cases in that manuscript, which are pretty numerous, I have transcribed and translated ; but of them, as few, comparatively, were decisive of nice points, and on branches of the law which are yet neither repealed nor obsolete—and as the head of that manuscript, announcing “ Here followe certaine cases of the Lord Dier’s collection, which, for some private reasons, hee thought fitt not to make them vulgarr,” rendered any publication of them a little delicate, I have confined myself to those only which have been selected as unexceptionable : and as they are not in number of sufficient importance to add separately at the end of the Reports, I have introduced them into the notes, in places where similar questions of law are discussed, not-
ing

TO THIS EDITION.

ing them also to be extracted from this manuscript.

As it was the fixed intention to preserve the last Edition entire, I have judged it proper to publish the last very copious Index : it is translated and prefixed to the Work :—but on examining it, when I found that not only the points determined in these Reports, but every little legal hint which was cited from any other book, and every loose dictum of Judge or Counsel was crouded together, incorporated, and very often falsely paged, leaving that to answer for its own accuracy, I imagined an Index of those points alone which belong to the reported Cases, and given at length after the manner in which all the modern Indexes are drawn up, would not only be convenient but necessary. That new Index is at the end of the Third Volume.

WITH respect to the mode of quotation, no Lawyer can be at a loss when the initials of a book are given, to know what book is intended. I shall therefore only observe, that wherever Fitz. N.B. occurs between crotchets, the paging is of the eighth Edition ; in every other place,
it

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it refers to the paging of the old Edition, which is preserved in the margin of the eighth ; and of the books that I have referred to, the several Editions of which vary from each other in their paging, as it will be convenient to him who wishes to consult them to know what Editions I have used, I subjoin the following List :

Black. Com. - -	1783	Gilb. Evid. - -	1777
Crompt. Prac. - -	1783	H. H. P. C. - -	1778
Cruise Fines - -	1786	Hawk. P. C. - -	1777
— Recoveries	1786	Robins. Gavelk. -	1788
Cunningh. Tithes	1777	Ld. Raym. Rep. -	1790
Barnes Rep. - -	Quarto	Sayer Costs - -	2d Edit.
Bull. Ni. Pr. - -	1785	Swinb. on Wills -	1743
Dav. Rep. <i>English</i>	12mo.	Went. Off. Exec. -	1774
Dougl. Rep. - -	1786	Wood's Inst. - -	10th Edit.
Fearne Cont. Rem.	3d Edit.	Madox Hist. Excheq.	1769
F. N. B. - - -	1755	Bracton, <i>Lond. Tottel.</i>	1569
Fost. Cr. Law - -	1786	Com. Dig. - -	1789
Gibb. Cod. - -	2d Edit.		

No. 8, *King's Bench Walks,*
Inner Temple,

SOME

SOME
A C C O U N T
OF THE
L I F E
OF
Sir JAMES DYER, Knt.

OF the private Life of DYER, of the plan pursued by him in his studies, the means by which he attained his several promotions, and of his conduct as an Advocate and as a Judge, (the most instructive and entertaining part of Biography) our information is extremely defective: these particulars which his contemporaries alone could have communicated, we are irreparably deprived of; and are reduced to a meagre catalogue of names and dates, from which the few following facts alone can be collected,

JAMES DYER was descended from an ancient and honourable family (*a*) in *Somersetshire*, being

(*a*) Of this family was *Sir Edward Dyer*, Chancellor of the Garter, a polite scholar and eminent poet, and a very formidable competitor with *Sir Christopher Hatton* for the favours of *Queen Elizabeth*. He was fourth in descent from our CHIEF JUSTICE's great-grandfather. See *Strype's Ann. of the Reform.* vol. ii. p. 308,

the

SOME ACCOUNT OF THE

the second and youngest son of *Richard Dyer*, Esquire, of *Wincalton* and *Round-bill* in that county; at the latter of which places he was born about the year 1512 (*b*). Of his youth, or the earlier part of his education, I find no account; but we are informed by *Wood*, that he was a Commoner of *Broadgate Hall* (now *Pembroke College*) in *Oxford*; and that he removed from thence, without taking any academical degree, probably about the year 1530 (*c*), to the *Middle Temple*. Here he seems to have rendered himself conspicuous for his learning and talents, as in 1552 he performed the office of Autumnal Reader in that Society; a distinction which was at that time conferred only upon such as were eminent in their profession. He had on the 10th of the preceding *May* been

(*b*) If this date, which is collected from his age at the time of his death, be correct, it will follow, that the former parts of his Reports are not from his own pen, for we have some as early as 1512. Indeed, if we were to take in their literal sense the expressions in the verses prefixed to the work,

“ Curia quas *lustris* sex celebrata dedit;”

and

“ Et quæ *ter denos* vix sunt congesta per annos;”

we should conclude, that all those which precede 6. *Edw.* 6. were from another hand. But since from 28. *Hen.* 8. in or about which year I suppose him to have been called to the Bar, the Reports follow in a tolerably regular series (though there still remains a chasm in *Edw.* 6.'s reign), we may perhaps fairly infer that all the cases from that time are selected from notes taken by himself.

(*c*) An interruption in the Records of the *Middle Temple* from 1525 to 1551 has disabled me from verifying these dates.

called

LIFE OF SIR JAMES DYER.

called to the degree of Serjeant at Law, and in the following *November* his abilities were rewarded with the post of King's Serjeant. Upon the meeting of the last Parliament of *Edward VI.* in *March 1551*, DYER was chosen Speaker of the House of Commons, (that office being considered in those days as peculiarly appropriated to lawyers of eminence) and in this capacity, on *Saturday* afternoon *March* the 4th, made "an ornate oration before the King." This is the only particular concerning the Speaker occurring in the Journals of that short Parliament, which sate only for one month; and the dissolution of which was quickly followed by the death of that excellent young prince; whose successor, though in most respects she pursued a line of conduct totally opposite to that of his reign, continued the royal favour to DYER, whom, on 19 *October 1553*, she appointed one of her Serjeants. In this office his name appears as one of the Commissioners on the singular trial of *Sir Nicholas Throckmorton*; when his jury, with a freedom rarely exercised in that unhappy period, ventured to acquit the prisoner. Our Author's behaviour upon that occasion is not disgraced by any servile compliances with the views of the Court; yet his regard for his own character was tempered with so much discretion, as not to occasion any diminution of her Majesty's protection: for on 20 *May 1557*, being at that time Recorder of *Cam-*
b *bridge,*

SOME ACCOUNT OF THE

bridge (*d*), and a Knight, he was appointed a Judge of the Common Pleas, whence in the next year, 23 *April*, he was promoted to the Queen's Bench, where he sate (though of the reformed religion) during the remainder of this reign (*e*) as a Puisne Judge. In the first year of Queen Elizabeth, on 18 *November* 1559, he returned to the Common Pleas, of which he was appointed in the following *January* Chief Justice, in the room of *Sir Anthony Browne*, who was removed for his attachment to the ancient superstitions, and who was content to remain a Puisne Judge of that court in which he had presided. This was the summit of DYER's promotions, and he continued for more than twenty years to exercise the functions of this important office with eminent integrity, firmness, and ability: to those func-

(*d*) He was also connected with the University; for I find among the MSS. of *C. C. College Cambridge* (cv. 1. p. 91.) a letter from him to the Vice-Chancellor, 12 *December* 1557, with his opinion on a case then depending in the Vice-Chancellor's court. I shall take this occasion to observe, that *Tanner*, in his List of our Author's *Works*, enumerates an *Epistle to Matthew Parker* in the Library abovementioned; which however is merely a letter to the Archbishop, requesting him to grant his Chaplain, *John Allgood*, a dispensation to hold two livings, dated *Serjeants Inn*, 26 *Nov.* 1565 (*C. C. C. MSS.* cxiv. 107. p. 341.)

(*e*) During this reign he paid an acceptable compliment to the Queen's attachment to the interests of the Church, by converting his donative of *Staplegrave juxta Taunton* into an advowson pre-rentative; for this seems the meaning of *Strype* (*Annals of the Reformation*, vol. ii. p. 390.).

tions,

LIFE OF SIR JAMES DYER.

tions, however, his labours were entirely confined, for in that age eminence in the profession of the law was not, as in modern times, a certain step to the higher honours of the State. The jealousies which for many centuries prevailed between the professors of the imperial and of the common law, and the preference given by our Kings (*f*) to the former over the latter, which had a greater tendency to freedom, (a preference manifested in the countenance they shewed to its professors, in choosing to employ them in their business, and in the salaries and places they provided for their encouragement) as they are well-known facts, so they had a great effect in the temporary depression of its professors. *Lord Herbert* observes, that in the Council established at the commencement of the reign of *Henry VIII.* there was not one common lawyer. We are not therefore to be surprised that the promotions of DYER were wholly confined to the honours of his profession. In the course of executing the duties of his office, we find him assisting at the trial of *Thomas Howard Duke of Norfolk*; on which occasion he opposed that unfortunate Nobleman's petition to have Counsel assigned him; and with propriety as the rigorous complexion of the law was at that time, it having been re-

(*f*) A relick of this superiority seems to exist in the right of pre-audience claimed and enjoyed by the Civilians even in the courts of common law.

SOME ACCOUNT OF THE

served for the milder spirit of a later age to indulge prisoners in his unhappy situation with this privilege (g). In 1574 he exhibited a singular proof of probity, courage, and talents, in the spirit with which he opposed the attempts of *Sir John Conway* to oppress a poor widow of *Warwickshire* (that county being included in the circuit which he usually went), by forcibly keeping possession of her farm; and in his reply to the Articles preferred against him to the Privy Council by certain Justices of the Peace, whom he had severely reprehended in public at the assises for partiality and negligence in permitting so gross a violation of the law, and whom he had caused to be indicted for the same. This piece, being a singular curiosity, and the only composition of DYER's which I have met with out of the line of his profession, is transcribed at length from the *Inner-Temple MS.*

(g) The Nobleman who introduced the bill (7. Will. 3. c. 3.) which confers this privilege, having been unable, from embarrassment; for some minutes to proceed in his speech on that occasion, adroitly converted that circumstance into an additional argument: "If I," said he, "innocent and unaccused, am so much awed by this august assembly as to be stopped in a set speech, how much harder must be the condition of a criminal, pleading for his life, depressed by guilt, or incapacitated with terror!" alluding to that of *Tacitus* (*Annal.* lib. 2. c. 67), *Orandi nescius, proprio in metu qui exercitum quoque eloquentiam debilitat.* *Dalrymple* (*Memoirs of Great Britain*, vol. iii. p. 61.) and *Dr. Kippis* (*Biographia Brit.* vol. iv. art. *Third Earl of Shaftesbury*) relate this of the philosophical *Lord Shaftesbury*; *Dr. Johnson* refers it to *Lord Halifax*.

LIFE OF SIR JAMES DYER.

“ THE ANSWER OF THE SAID JUSTICE DYER
“ TO THE ARTICLES CONTAINED IN THE
“ FORESAID SUPPLICATION.

“ I. IN answer to the shooting once of a
“ gun(*b*), in the time of the assizes, I am sure
“ I was not so greatly offended if it were not
“ of purpose done; as the said complainants do
“ in the said Articles presume that it was not
“ done for any disturbance; nor these words of
“ *sic volo, sic jubeo*” were used by me for that
“ cause.

“ II. To the second, I do confess that I said
“ openly I had told some of the Lords of the
“ Council, that I saw never a Justice indifferent
“ to deal in the matter touching *Sir John Con-*
“ *way*: and so I said to the *Lord of Leicester*,
“ in the *Inner Star-chamber*, in the presence
“ and hearing of *Sir John Hubbard*, Knight,
“ in *Trinity* Term last. And this moved me
“ to say, because all the Justices there, at *Lent*
“ assizes, came to me together, praying me in

(*b*) To explain this, it will be necessary to extract a passage from the “ Supplication ” to which it is a reply. “ In the time of the assizes there happened to be a gun shot off, both without the Justices’ will or knowledge, or intention of the party to work any offence. THE LORD DYER, herewith moved, charged the Justices with a general slackness of their duties; said, they ruled the country as pleased them, and that there was nothing with them but “ *sic volo, sic jubeo*.”

SOME ACCOUNT OF THE

“ the behalf of *Sir John Conway*, that the
“ matter might be committed to the order of
“ some gentlemen of the country · which I
“ then thought to be a request not indifferent,
“ considering the poor widow could never find
“ any assistance of them in her suit and trial ;
“ nor to speak in her cause, but rather against
“ her, saying all that she was a naughty wo-
“ man, and had two husbands alive, which was
“ nothing to the matter.

“ III. To the third, I confess in giving the
“ charge I staid somewhat long upon the points
“ of riots, &c. noting an heinous and notorious
“ riot and force committed and kept in that
“ county, as the report went in *Westminster*
“ *Hall* the Term before, and rang over all
“ *England*, whereof they should receive bills of
“ indictment for the finding thereof ; which I
“ said might have been done by the Justices of
“ Peace there, after a view by them made at the
“ place where the fact and riot was kept, either
“ at a set sessions for the purpose, or at one of
“ the two next quarter-sessions. And seeing
“ there was nothing done in it, but the thing
“ winked at, I thought there must needs be
“ great bolstering and bearing amongst the Jus-
“ tices, speaking it generally, not naming any
“ particular person.

“ IV. ITEM, I said the Queen's Majesty had
“ intelligence of the matter and riot, and that
“ she

LIFE OF SIR JAMES DYER.

“ she took it at the heart ; and her letters
“ thereof sent to me and my fellow, declared
“ no less. Which letters at length I was fain
“ to cause to be read openly in the face of the
“ country, or otherwise any riot would have
“ been hardly found, as I think. For *Sir Fowke*
“ *Grevile* had said before openly at the Bench
“ to my face, that his brother *Conway* might
“ well justify the force in keeping his possession
“ upon the trial found for him at the common
“ law : which I then utterly denied, and yet
“ do. And further he said, that I did once al-
“ low well of the first verdict (i), and gave
“ judgment upon it : both which points I did
“ deny ; but he constantly affirmed it by oath,
“ *by God*,” twice or thrice : although it was in
“ truth manifestly false ; for the verdict I mis-
“ liked, and the judgment was given in the
“ King’s Bench.

“ V. ITEM, I do confess the framing of my
“ bills myself ; the party for poverty not able
“ to have Counsel to do it ; and the Queen,
“ whom this matter did touch, having no
“ Counsel for her there to do it. Which thing I
“ was bound to do, and so is every other Justice
“ for the advancement of her service, or else

(i) *Sir John Conway* had evicted the widow for rent-arrear ; but by a decree of “ the Court of Requests in the *White-ball* ” proceedings had been stayed on that ejectment, and an action of trespass ordered to be brought by her against *Sir John*, in which second action he had been found guilty.

SOME ACCOUNT OF THE

“ justice should fail oftentimes in such cases ;
“ the offender being such and so well allied
“ there as *Sir John Conway* is. And for more
“ credit of the matter, and to instruct the jury’s
“ consciences, I required *Mr. Samuel Marrow*,
“ the High-Sheriff, to declare by his oath the
“ manner of the force and riot that he found
“ when he made the view of the place. But
“ with many persuasions for the Queen I could
“ not move him to be sworn :—a contemptuous
“ neglecting of his duty !

“ VI. FOR the putting in the names of
“ *Mr. Eglington* and *Mr. Dabridgcourt* in the
“ bill of indictment : I was informed, that al-
“ beit they were not *next* to the fact and place,
“ yet were they *nearer* than the more part of
“ the Justices ; and also were specially required
“ to have assisted the Sheriff when he went to
“ the place ; and did not : but what distance
“ there was between their houses and *Stud-*
“ *ley (k)*, I know not ; referring it to the
“ knowledge of the jury themselves ; willing
“ them that if any thing contained in the bills
“ were untrue, and against their consciences to
“ be found, that they should put it out, and

(k) *Studley-St.-John’s* was the farm out of which the widow had been turned, and in the forcible keeping of which against her and the sheriff who came to restore her to the possession of it the riot was committed, for the not suppressing of which this indictment had been framed against the Justices *Eglington* and *Dabridgcourt*.

“ find

LIFE OF SIR JAMES DYER.

“ find the rest, as afterwards they did in two
“ places,

“ VII. AND I do confess that I was very
“ angry both with a Jury charged with prison-
“ ers upon life and death, because they had
“ eaten and drunken between their charge given
“ and their verdict rendering; and also with
“ the Jury for the body of the shire, for that
“ they so long did stick to find the bills; they
“ having found and presented divers other bills
“ of less importance. The time also to ad-
“ journ the Court drawing nigh, gave me oc-
“ casion to give a lawful menace to them, that
“ I would not depart the country till the mat-
“ ters of the bills were found; and that I
“ would charge (1) another inquest to enquire
“ of their concealment, and set good fines upon
“ them; and that my brother *Barham* should
“ travel in the rest of the circuit; as I might
“ lawfully say.

“ VIII. MOREOVER I do confess that I denied
“ to the two Justices a copy of their indict-
“ ment, and also to admit them to a traverse;
“ for that is not usual to be done at the same
“ sessions wherein the indictment is found:
“ but the party indicted is first called by process
“ to make answer; and besides that, the Judge
“ by discretion (the case being so weighty as

(1) Which he might do by stat. 3. Hen. 7. c. 1.

SOME ACCOUNT OF THE

“ this was) may certify the indictment into
“ *B. R.* where traverse and trial may most
“ orderly and indifferently be pursued. And
“ that was my meaning, and accordingly have
“ I done: and yet neither against law nor
“ equity, as is supposed.

“ IX. As concerning my hard dealing here-
“ tofore used towards some Justice of Peace (*m*),
“ for a wilful escape, which I urged the Jury
“ to have found; I know not whom they mean
“ by it: but I have always used, upon any
“ escape of a felon, to cause the indictment to
“ be made for that escape, ‘*voluntariè et felo-*
“*niciè*’;” aggravating the offence, by common
“ presumption, for the Queen, to be so indeed:
“ but yet the Jury, for the most part, do use
“ to put in ‘*negligentèr*’ in the place of ‘*vo-*
“*luntariè*’ or ‘*feloniciè*’, unless there be very
“ plain evidence to prove it wilful.

“ ALL which premises being true, as indeed
“ they are, I ask judgment of the said Lords,
“ and all others indifferent, whether I had just
“ cause ministered unto me by the defaults of
“ the Justices and government of the shire, and
“ slackness of her Majesty’s service, to be angry,
“ and vehemently moved to choler. And al-

(*m*) Among other frivolous and impertinent charges in the
“ SUPPLICATION,” the Justices object to DYER, that he ordered an indictment for a wilful escape to be preferred against a Justice of the Peace who had permitted a negligent one.

“ though

LIFE OF SIR JAMES DYER.

“ though I did say *in excessu meo*, ‘ *Omnis homo mendax*’ (as *David* said), yet for mine age
“ and long continuance there, which hath been
“ above twenty years in that circuit, I am rather to be borne with than complained of,
“ (as I think in mine own judgment), first, in
“ all haste to the Queen’s Majesty herself by
“ mouth, and next to the Lords of the Council
“ by bill of supplication, as is aforesaid.

“ JAMES DIER.”

I have not been able with certainty to discover the event of this dispute; but it seems reasonable to conclude that the firmness and ability of DYER prevailed over the malice of his adversaries; especially as he experienced no diminution of the Queen’s favour, but continued in the full exercise of his judicial functions, without any other memorable transaction that I have been enabled to meet with, down to his death, which happened at his seat of *Great Stoughton* (an estate purchased by himself), in the county of *Huntingdon*, 24 Mar. 1582, at the age of 70 years.

Leaving no issue by his wife, *Margaret* daughter of *Sir Maurice à Barrow*, of *Hampshire*, and relict of the celebrated Philologist *Sir Thomas Elyot* (n), his estates at *Stoughton*

(n) Author of “*The Booke of the Governour*,” of a Dictionary which was the foundation of *Cooper’s Thesaurus*, and of other works. He died in 1546.

and

SOME ACCOUNT OF THE

and elsewhere, with his mansion-house in *Charter-house church-yard*, descended to *Sir Richard Dyer* (grandson of his elder brother *John*); whose grandson *Lodowick* in 1653 sold *Stoughton* to *Sir Edward Coke* of *Derbyshire* (from whom it is now, by purchase, vested in the family of *Walter*), and the line which, in 1627, was honoured with the title of Baronet, is now extinct, the last of the family dying in a state of extreme indigence.

By his will, which was made on the 13th of *March* preceding his decease (e), he bequeaths to his nephew *Richard Farwell* (p) all his books of the law, “as well Abridgments and
“Reports of myne owne hand-writinge, as
“other of the lawe;” which expreffion seems

(e) It begins with this solemn invocation, which affords another specimen of the talents of our CHIEF JUSTICE for composition: “In the name of the Father, the Sonne, and the Holy Ghost, Amen. I, JAMES DYER, Knight, Chief Justice of
“the Common Pleas, considering with myself the incertentye of
“this vaine and transitorye life, and the suddaine callinge awaie
“of us from the same by deathe; and for the avoidinge of dis-
“corde and strife, that commonlie I see to ensue after the deathes
“of such as die intestate, aboute the trashe and pelfrye of this
“wicked worlde, being of perfecte healthe and memorye (God
“be thanked!), doe ordeyne and make in this writinge withe
“myne owne hande this my last will and testament in maner
“and forme followinge.”

(p) He was one of the Editors of the Reports, which are, as appears from the original Preface, only selected from a much larger collection; of which larger collection the *Inner Temple MS.* is perhaps a fragment.

LIFE OF SIR JAMES DYER.

to countenance the assertion of *Cole* (*q*), that he made an “Abridgment of the Lawe:” but as no other notice has reached the present age of any such compilation, which from the pen of so judicious a writer must have been highly valuable, these ambiguous expressions seem only to refer to the Reports, which from their conciseness may not unaptly be so termed: and it seems more reasonable to conclude that he wrote nothing (*r*) except these Reports, and a Reading on the statutes of Wills, 32, 34, and 35 *Hen. VIII.* which was probably composed by him when he filled the office of Reader; it being the design of that institution to explain to the Students the constructions that were to be put upon *new* statutes (*s*).

He was buried at *Stoughton*, in the church of which place is an handsome monument erected to his memory, with the following inscriptions:

Here lieth SIR JAMES DYER, *Knight*, sometimes
Lord Chief Justice of the Common Pleas, and *Dame*
MARGARET his wife: which *Dame* MARGARET was
here interr'd the six-and-twentieth day of *August*, 1560,

(*q*) Harl. MSS. 760. p. 450.

(*r*) In Harl. MSS. 2077 is the opinion given by the CHIEF JUSTICE and his Brethren on the privileges of the county-palatine of *Chester*, in consequence of the Queen's mandate, dated 11 *Mar.* 1568; and it is there said to be enrolled in Chancery, p. 105.

(*s*) Life of Lord Guilford, p. 76.

SOME ACCOUNT OF THE

and he the said SIR JAMES, upon the five and-twentieth of *March*, 1582.

DEYERO tumulum quid statuis, Nepos ?

Qui vivit volitatque ora per omnium.

Exegit monumenta ipse perennia :

In queis spirat adhuc ; spirat in his themis,

Libertas, Pietas, Munificentia.

En decreta, libros, vitam, obitum senis !

Æternas statuas ! Vivit in his themis,

Libertas, Pietas, Munificentia.

Æternas statuas has statuit sibi :

Æternis statuis cedit marmora !

Patruo majori charissimo, ejusque conjugi amantissimæ posuit

RICHARDUS DEYER (†), Miles.

Among his contemporaries DYER was universally esteemed the most perfect model of a Judge for learning, integrity, and abilities. The eulogium of *Camden* is only the echo of the public voice upon that subject : “ JACOBUS DIERUS,” says that Annalist, “ *in com-muni placitorum tribunali Justiciarius Primarius, qui animo semper placido et sereno omnes judicis æquissimi partes implevit ; et juris nostri prudentiam commentariis illustravit.*” Lord Chancellor BROMLEY was his particular friend, and consulted him upon all occasions ;

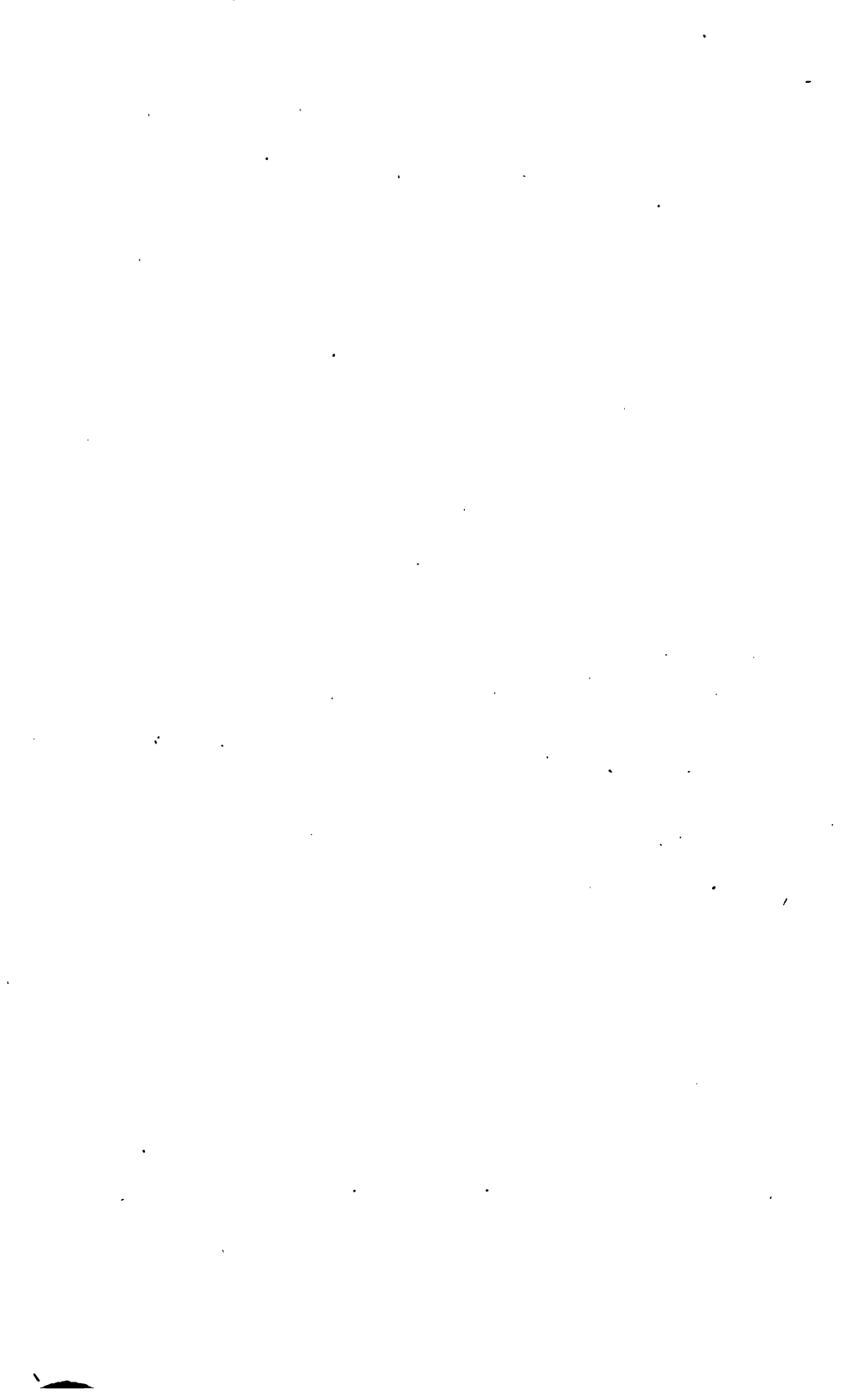
(†) This is the *third* manner of spelling the name which we have seen ; even at a much later period orthography was very little attended to. The disputes between the Commentators on *Shakspeare* about our great Poet’s mode of writing his own name are well known. See on this subject Barrington Obs. Anc. Stat. 3d edit. p. 219. Biograph. Britann. vol. iii. pp. 380. 450. Selden ad Fletam, ii. 2. Clarke’s Connexion of Coins, p. 418. Paston Letters, vol. i. Pref. p. xxv.

and

LIFE OF SIR JAMES DYER.

and men the most illustrious for their rank, and the most eminent for their talents, thought it an honour to be admitted to the intimacy of so great a character. Nor was his reputation confined to the times in which he lived ; every succeeding age has conspired to render its tribute of applause to his extraordinary merit ; but to enumerate these would far exceed the limits of this sketch : I shall content myself with transcribing that of a famous lawyer (u): “ If
“ we have failed in the number of the persons
“ reporting, it hath been amply recompensed
“ in the grandeur and authority of one single
“ Author, SIR JAMES DYER, *Chief Justice*
“ of the Common Pleas, by whose great learning and assiduous study the Judgments and
“ Law Resolutions have been transmitted and
“ perpetuated until the 24th year of the late
“ Queen *Elizabeth*.”

(u) Sir Harbottle Grimstone, Pref. to Cro. Car.



ORNATISSIMO VIRO

THOMÆ BROMELEY, Militi,

DOMINO CANCELLARIO ANGLIÆ,

R. FAREWELL et J. DYER

IN DOMINO SALUTEM ET FELICITATEM PLURIMAM
EXOPTANT.

POSTQUAM opus hoc in lucem edere prælo-
que committere statuissimus (honoratissimè
domine) cujus potissimum tutelæ ac patrocinio
commendaremus, diu multumque dubitavimus.
Et quamvis supervacaneum fortasse videri possit
(ratione præsertim rei ipsius habitâ, Authorisque
facultate perspectâ) Protectorem et Patronum ad-
scribere; tamen cum mors, nobis Authoris vitam
inviderit, multosque hæc nostra ætas protulerit,
quibus cordi est alienæ industriæ obrectare, opere
precium existimavimus huic nostræ orbitati, al-
terum patrem parentemque adsciscere. Quem qui-
dem te (vir insignissime) ut aptissimum, ita et
paratissimum fore humillimè obsecrare tandem
statuimus. Neque tuam dominationem enixè im-
plorare erubescimus, qui cùm pro summâ authori-
tate possis, pro magnâ etiam amicitia quæ tibi cum
Authore intercessit, velis hanc non gravem at lau-
dibilem provinciam sustinere. Quòd si in tuâ
bonitate portum et perfugium hâc in re habituri
simus, si sub tuo patrocinio, ut olim Ulixi sub
Ajacis clipeo huic operi latere liceat, bonam in
spem venimus, neminem sic frontem perfricuisse,
neminem ad calumpnias naturam sic peperisse,
voluntatem exercuisse, fortunam servasse, qui te

C

appro-

· approbante improbare, te defendente impugnare,
te denique protegente convitiis lacérere sit ausus.
Neque solum hâc tuâ propugnatione invidorum
impetum propelles, ipsumque Codicem ab omni
calumpniæ metû defendes, sed nos etiam qui tuæ
dignitati multum in præsentiarum debemus, pluri-
bus et arctioribus officiorum vinculis, tibi in per-
petuum devincies.

Tuæ dignitatis studiosissimi

R. FARWELL,

J.A. DYER.

TO THE

TO THE
S T U D E N T S
 OF THE
COMMON LAWS OF THIS REALM,
 AND ESPECIALLY TO OUR MASTERS THE
BENCHERS AND FELLOW-STUDENTS
 OF THE
MIDDLE TEMPLE,
R. F. and I. D.
 WISH INCREASE OF LEARNING.

AFTER that this Worke, by the last will and testament of SIR JAMES DYER, Knight, late Lord Chiefe Justice of the Common Pleees, our most deare and loving uncle, came to our hands, being most earnestly required by some our loving friends, and those of good judgement and knowledge in the common laws of this realme, to grant unto them the view thereof, we regarding our friends so requiring us, and finding ourselves by many good offices and duties deeply bound unto them, could not without some touch of unkindnesse but satisfie their demand, (which obtained) the opinion they had of the Author of this Worke, together with the excellencie thereof (as they said), seemed so to enflame them with desire to have the same, as that the bookes themselves, or the copies thereof, without breach of friendship might not be denied them: which also granted, and with better judgement and deliberation read and digested, they endeavored to perswade us to assent to the imprinting thereof, as things in their judgements right worthie to be published. Where-

unto for the space of two yeares after we assented not, ne purposed to yeald unto at all. Yet such was the importunacy of our said friends as utterly disliking our long pause and contrary purpose, procured others of greater countenance, most earnestly to move us in that behalfe, who with sundrie weighty reasons (especially that of the common good that was like to ensue), very effectually assailed us. The due consideration we had of these men, together with their grave and learned judgements of the Worke (having seen and in part perused the same), wholly brought us to alter our foresetled determination. Whereupon wee, according to our best abilities and judgements, tooke in hand to peruse some part thereof, and for the residue prayed the aid and assistance of other more exquisitly skilled, and of farre better judgement than our selves, to select and chuse out of the whole body of the said Worke, such cases and matters as should be fittest to be published, and most necessary and profitable for the Students and Professors of the Common Lawes: which done, and the Cases and matters so selected and picked out, arising to a competent volume, we were emboldned by printing to publish the same. Wherein, inasmuch as the readers shall not find the Cases so fully argued and largely disputed, as in other bookes and reports of law is to be seen (and as they and we also could have wished), we pray them to weigh the state of the Reporter, a man no doubt though very diligent and studious, yet by reason of his place and office which he furnished and executed untill his death, and about important causes for the most part of his time so imployed, that he wanted time and leisure to polish and beautifie

tifie the said cases with more large arguments, which he had in full purpose to have done, had not death prevented him; and yet hath he for the most part so sufficiently reported the same, as unto the painefull and diligent student they will both move sufficient delight to read, and afford plentiful store of matter worthie his travaile. In the perusing whereof, we dare boldly protest, as wel for the rest as for our selves, that wittingly there is not any matter overpast which any way may tend to the depravation, slander, or discredit of any persons, their estates or titles: only our care was to set forth the matters containing substance of law: as for collaterall and bye causes, we alwaies omitted them as things impertinent to this our purpose, which we hope is performed accordingly. Now it remaineth (sithence we for our parts in this our action have preferred the generall and publicke good, before our owne private respect) that the good acceptation and friendly thankfullnesse of all such as are to receive knowledge and fruit thereby, may appeare such, as the late reverend Judge and painefull Author thereof may receive the guerdon worthie his exquisite and painfull travaile; and we, that which for our honest minds and most friendly purpose in publishing the same we shall seeme to have deserved. Thus, most heartily wishing that the reading of this Work may redound to no lesse profit and knowledge of them that be students therein, than was ment and intended unto us by the last and best will of our most natural and loving uncle, we commit you to the direction of God's Holy Spirit.

LECTORI CARMEN.

ARBORIBUS veluti sua conferit arva Colonus,
Quem movet innatus posteritatis amor ;
Consulit ut soboli fidissima cura parentum,
Erudiendo animos, supeditando bona ;
Sedula sicut apis stipat liquentia mella,
Ut comedant alii dulce laboris opus ;
Sic bonus, insignis sic sedulitate Dyerus,
Poma, mel, et soboli concumulavit opes.
Fasciculum causas omnes congeffit in unum,
Curia quas lustris sex celebrata dedit.
Edidit has alter, fructus ut postera proles
Perciperet, tanto qui placuere viro.
Edidit, ut sitiens versaret mella palato,
Carperet esuriens mitia poma sibi.
Edidit ut semper post funera viveret Author :
Quem rapuit studiis mors inimica piis.
Fidus Aristidæ fuit æmulus atque Minervæ,
Indicat hoc Codex, indicat illud honor.
Possedit nomen non abs re grecolatinum,
Nam sincera Dei pectora movet *ipsus*.

JA. DYER.

CANDIDO LECTORI CARMEN.

ECCE per assiduos tandem collecta labores,
Expectata diu, jam monumenta patent.
Et quæ ter denos vix sunt congesta per annos,
En uno includit pro breuitate libro.
In cuius laudem, satis est scripsisse Dierum,
Patronoque alio non opus esse reor.
Cujus nota satis doctrina, potentia, virtus,
Cujus juncta gravi cum pietate fides.
Cujus summus honor, cuius veneranda potestas,
Semper erunt domini signa notæque sui.
Ergo vade Liber, primoque in fronte, Dierum
Inscriptum gestas, hoc duce tutus eris.
Improba ne dubites vani convicia vulgi,
Sat tibi sit tanti gesta fuisse viri.
Quem nec consumet spatium nec longa vetustas,
Tempora quem rapient nulla, nec ulla dies.
Docte Dicere vale, tua fama perennis Olympo
Vivet ad extremos te moriente dies.

I. R.

IN OPTIMUM ET ORNATISSIMUM VIRUM
DOMINUM JACOBUM DYERUM,
EQUITEM AURATUM,
ET CAPITALEM PLACITORUM COMMUNIORUM JUSTICIARIUM,
GABRIELIS GOODMANNI CARMEN.

ILLE Dierus amor patriæ, pius ille Dierus
Cujus mens constans, et inexpugnabile pectus
Legis erit rectique tenax, et juris asylum :
Ut vivus causas æquato jure diremit,
Sic jam defunctus, monumentis jura retexit,
Ut juris patrii studiosis utilis esset.
Hunc obiisse putem ! minimè. Qui tam benè vixit
Non obiit, nec obire potest, sed vivet in ævum
Cum Christo cœlis, in terris, ore virorum.

P R E F A C E

TO THE

L A S T E D I T I O N.

IT will be wholly needless to write any thing in commendation of so necessary and useful a Work; for, as it received Encouragement at first from many learned and judicious Persons of the first Rank, so it must be owned and acknowledged by all to be of general Use to all the Students and Professors of the Law. All therefore that shall be said by way of Preface or Introduction shall be some Observations touching the following Particulars: (viz.) 1. Touching the supposed Authors or Collectors of these Notes and References. (2) Some Cautions concerning the same. And (3.) some Advertisements touching the use of them.

1. As to the Collectors of these Notes and References (except those referring to some Modern Authors), they were collected by the care and industry of Five or Six of the most eminent and learned Lawyers that this last Age hath bred; and whose Worth, Learning, and Abilities, are yet fresh in the memory of many living: and this Book, together with the Notes and References, was one of the said Collectors' original Books, which a person of honour, who was very curious in his collection, had gotten into his library, from whence the Publisher purchased the same, and hath since compared it with several other of the said originals now in the custody of some Lawyers of eminency and note.

(2) Touching the Cautions concerning these Notes and References, let none slightly reject any of the said References, or condemn them as faulty, because they cannot at first sight find out their

suitable-

PREFACE TO THE LAST EDITION.

suitableness or resemblance to the Case to which they are referred : but let such maturely and deliberately weigh and consider the grounds and reasons of the said Cases, before they reject any of the said References : for an unsteady and hasty judgment may reject that which a more sound and judicious judgment will value and esteem. A solid judgment will try and weigh particulars, that out of them it may sever for its use the good from the bad ; for knowledge lies in things, as gold in a mine, which must be dug out with much sweat and labour.

(3) The third thing propounded was to give some Advertisement touching the use of the References ; and for explaining them, and making the Work the more intelligible, I have here set down the several books at large to which the References lead you, together with their abbreviations.

The 10 Year Books	-	-	1. E. 3. 1. H. 6. &c,
Plowden's Commentaries	-	-	Plow,
Cook's Reports, the 11 Parts	-	-	Co. 1. 2. &c,
Cook's Entries	-	-	Co. Entr,
Crook's Reports, 3 Parts	-	-	1. Cro. 2. Cro. &c,
Hobart's Reports	-	-	Hob.
Bulstrode's Reports, 3 Parts	-	-	1. Bulstr. &c,
Brownloe's Reports, 2 Parts	-	-	1. Brn. &c,
Bridgman's Reports	-	-	Bridg.
Bendloe's Reports	-	-	N. Ben. Ben. in Kell,
Brook's New Cases	-	-	B. N. C.
Coke's Littleton	-	-	1. Inst,
— on Magna Charta	-	-	Co. Mag. Ch. 2. Inst.
— Pleas of the Crown	-	-	Pleas Cro. 3. Inst.
— Jurisdiction of Courts	-	-	4. Inst.
Register of Writs	-	-	Reg.
Davis's Reports	-	-	Dav.
Doctor and Student	-	-	Dr. et St.
Godbolt's Reports	-	-	Godb.
New Books of Entries	-	-	N. E.
Leonard's Reports, 4 Parts	-	-	1. Leon. 2. Leon. &c.

Latche's

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Latche's Reports	-	-	-	Latch.
Marche's Reports	-	-	-	March,
Moor's Reports	-	-	-	Mo.
Noy's Reports	-	-	-	Noy,
Owen's Reports	-	-	-	Ow.
Popham's Reports	-	-	-	Pop.
Perkins' Law	-	-	-	Perk.
Stiles' Reports	-	-	-	Sti.
Stamford's Pleas of the Crown	-	-	-	Stam. Pleas Cro.
West Presidents	-	-	-	West Presid,
Fulbeck's Parallele	-	-	-	Fulb. Par.
Rastal's Abridgment	-	-	-	Raft. Wills, &c.
Winche's Reports	-	-	-	Winch.
Yelverton's Reports	-	-	-	Yelv.
Anderfon's Reports, 2 Parts	-	-	-	1. And. 2. And. &c.
Rolls' Abridgment, 2 Parts	-	-	-	Ro. Abr. 1. 2.
Rolls' Repor	ts	-	-	{ 1. Ro. Rep. 2. Ro. Contin.
Vaughan's Reports	-	-	-	Vaugh.
Allein's Reports	-	-	-	Allep.
Savil's Reports	-	-	-	Sav.
Gouldsborow's Reports	-	-	-	Gouldb.
Hutton's Reports	-	-	-	Hutt.
Hetley's Reports	-	-	-	Hett.
Jenkins' Cent.	-	-	-	Jen. Cent.
Kelway's Reports	-	-	-	Kelw.
Ley's Reports	-	-	-	Ley.
Lane's Reports	-	-	-	Lan.
Fitzherbert's Natura Brevium	-	-	-	F. N. B. or N. B.
Wentworth's Office of Executors	-	-	-	Went. Offic. Exec.
Crompton's Jurisdictions of Courts	-	-	-	Crompt. Jur.
Jones' Reports	-	-	-	Jo.
Palmer's Reports	-	-	-	Pal.
Modern Reports	-	-	-	Mod. Rep.
Littleton's Reports	-	-	-	Lit. Rep.
Siderfin's Reports, 1 and 2	-	-	-	Sid. 1. 2.
Keble's Reports, 3 Parts	-	-	-	Keb. 1. 2. 3.
Saunders' Reports, 1 and 2	-	-	-	Saund. 1. 2.

For the better understanding the References, observe that some of the References to the Year Books and the Lord Cook's Reports, were contracted,

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tracted by the Collectors with as much shortness as possible, and which may probably lead the Reader into a mistake, for prevention whereof take an example or two: as in fo. 5. pl. (r.) in the margin there, you find 19. 22. H. 6. 59. 28. and 6. 8. 10. Co. 8. 3. 38. which are thus meant, (viz.) 19. H. 6. 59. 22. H. 6. 28. 6. Co. 8. 8. Co: 3. 10. Co. 38. where you will find the cases referred to, *et sic de ceteris*. A second example you have, fo. 10. b. in the References towards the lower end, where you find Co. 4. 125. a. 8. 42. b. 44. which must be thus understood, (viz.) Co. 4. 125. a. Co. 8. 42. b. 44. And 3dly, in some places you will find a reference to a fol. of my Lord Cook's Reports, without naming what part of his Reports: in that case 'tis always intended the first Part of his Reports. And the like to any other Author, where there are more Parts than one of them. And that where you find any Reference to Crook without mentioning either Eliz. Cro. Jac. Cro. &c. or 1. Cro. 2. Cro. &c. there it is intended Kelway's Reports, which were published by Crook, and so got the name of Crook's Reports. And now, gentle Reader, having thus for thy help and ease through the travail of thy studies published this Work, I hope thou wilt in gratitude pass by some little mistakes that have escaped the Press in the References and Notes, and correct them as thou meetest them in the perusal of this Book: they are but few, considering the many thousand Notes and References here inserted, and those only the putting one letter for another in words of a like sound, or some letters transversed or misplaced, which may be easily corrected by observing the sense. Farewel.

T A B L E

O F T H E

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	Plummer,	-		272 b	33	Same,	-			324 b	37
	Acton (Sir Robert's) Cafe,			288 a	54	Austen's Cafe,	-			115 a	65
	Administrators of Vincent					Same v. Baker,	-			201 a	65
	v. Dale,	-		76 a	31	Ayer v. Orme,	-			221 b	20
Agard v. Bishop of Peter-						Ayliffe v. Platt,	-			81 b	65
borough,	-			129 b	66						
Ager v. Pool,	-			371 b	5						
Albeney's Cafe,	-			91 b	15						
Alford v. Eglisfield,				230 b	56						
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Allington v. Oldcastle,				88 a	107						
Altman's Cafe,	-			361 b	12						
Anderson v. Warde,	-			104 a	10						
Andrew v. Boughey,				75 a	23						
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Aphary v. Smith,	-			188 b	11						
Aprice v. Rogers,	-			233 a	10						
Ap-richarde v. Jones,				250 a	85						
Arden's Cafe,	-			235 b	22						
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Earl of Arundel's Cafe,				342 b	55						
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Same v. Lord Gray,	-			200 b	62						
Arundell v. Combe,	-			262 a	30						
Lady Arundel v. Earl of											
Pembroke,	-			263 b	36						
Ashton's Cafe,	-			228 a	46						
Assaby v. Lady Anne Man-											
ners,	-			235 a	20						

B.

B ABINGTON v. Sheldon,				206 b	13						
Bacon (Sir Nicholas') Cafe,				220 b	14						
Bacon v. Bp. of Carlisle,				346 a	7						
Bainton's Cafe,				-	96 a						
Baker v. Brook,				-	65 a						
Ballard v. Ballard,				-	128 a						
* Bammas —				-	285 N.						
Banister v. Benjamin,				47 a	6						
Barham v. Hayman,				173 a	15						
Lord Barkley's Cafe,				102 a	82						
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lips,				-	231 b						
Barret v. Cleydon,				168 a	17						
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					Dame						

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Easter Term,

[1. a.]

4. Hen. 8. after the Conquest.

(1) **I**N DEBT ON BOND the defendant pleaded that it was indorsed with this condition, That "if the defendant would render or cause to be rendered a sufficient account to the plaintiff of all rents, revenues, and profits of lands and tenements belonging to the commandry of *Stanford* in the county of *Oxford*, before the Feast-day of *Saint Philip and James* then next ensuing, &c. then the obligation should be void." (2) And he further said, that "before the said Feast-day he leased to the plaintiff a messuage, and two hundred acres of land in *S.* aforesaid, to hold to him at his will, in full satisfaction of all manner of accounts of the receipt of rents, revenues, and profits of lands and tenements belonging to the commandry of *S.*; which demise the plaintiff accepted, and entered into the said messuage and lands, and became possessed thereof accordingly, and still is;

In debt on bond with condition to render an account, acceptance of a lease at will in satisfaction is a bad plea.

Hob. 178. 1. Roll. Rep. 296. Cro. Eliz. 458. pl. 4. Jac. 649. pl. 19. 11. H. 7. 20. b. 41. E. 3. 7. a. See *Pinnel's Case*, 5. Co. 117. a. *Infra*, 56. pl. 18. 19. E. 4. 9. b. Litt. § 334. Perk. pl. 146. 10. H. 7. 4. 17. E. 4. 7. b. 35. H. 6. 36. H. 6. 9. b. 2. R. 3. 22. b. 10. H. 7. 14. b. 15. a. 19. E. 4. 1. b. 35. H. 6. 56. a. Perk. pl. 753. 749. 751. 3. H. 7. 3. b. *Pkow.*

(1) In debt on bond for three hundred pounds, brought by *William Dodd v. Edward Albin*, the condition was, That a stranger should make a good estate to the plaintiff and his heirs of certain land in *Eastbuston* in the county of *Norfolk*; and the defendant pleaded, that the plaintiff had accepted a judgment with certain covenants therein contained, in full satisfaction of the three hundred pounds; and this was adjudged by the whole Court of King's Bench to be no plea, *Mich.* 27. & 28. Eliz. wherefore the plaintiff recovered.

11. H. 7. 20. b. Annuity of twenty pounds, proviso, if he pay twenty shillings annually on the Feast-day of *Easter*, that then the annuity should be void; in a writ of annuity, a lease of the vesture of an acre of land in lieu of the twenty shillings was holden a good plea by all the Judges. But *T.* 19. H. 8. 9. a. annuity with similar proviso; and there in debt for the arrears, an acceptance of the manor of *F.* for years is by the opinion of the Court no plea; for the action is founded on the written matter, and this is only matter furnished in the deed. So 22. E. 4. 51. a. in the argument of *Cowlin* and *Cooke's Case*, *M.* 2. *Car. B. R.* [Noy, 83. Lat. 151. Poph. 183.] *LITTLETON* cited 19. *Jac Kebb's Case*, that a lease at will is not a good consideration for an *assumpsit*.

(2) 42. E. 3. 23. a. Performance of an extra-condition to a stranger by commandment is good. *Quere*, If there be not a difference between the doing of another thing, as here, and performance to another person? 32. H. 6. 9. b. 22. E. 4. 25. a.

291. a. Cro. Eliz. 46.
 356. 9. Co. 79. a.
 Keilw. 74. b. 5. Co.
 Spenser's Case, fol. 16.
 32. H. 6. 31. b. 19.
 E. 4. 2. b. Perk. 750.
 752. 758. Cro. Eliz.
 455. 716. Co. Litt.
 212. b. Hob. 68. 9.
 Moor, 877. See 6.
 Rep. 44. Blake's Case,
 where a covenant was
 broken, and accord with
 satisfaction ruled a good
 plea.

"the which matter, &c." (3) And to this plea the plaintiff demurred; and it was adjudged by THE COURT no plea. For they said, It is not like where there is a condition for the payment of a sum certain &c. for there a man may plead an acceptance by the plaintiff of some other thing, as of a horse, or a cup, or such like; but here the condition is not for the payment of any sum of money, but that he shall do some bodily service, that is to say, he shall render an account, &c. As if the condition were, that he should build a house before a certain day, the defendant could not plead acceptance of twenty pounds in satisfaction for the house, to which the plaintiff acceded, &c. (4) And in the case in 12. Hen. 4. 23. in debt on bond indorsed with such condition, that if the defendant should acknowledge a statute staple before the mayor of L. for twenty pounds on a certain day, then &c. and the defendant pleaded, that he came on that day to the said mayor, and brought with him the bond sealed with his seal, and acknowledged the obligation, and requested that the king's seal should be put to it, at which time the parties came to an agreement that the plaintiff should have a house immediately for the term of his life, in lieu of the said twenty pounds; into which house he entered, and occupied it, and still is seised thereof; judgment, &c. and ruled no plea. *Quod nota.* See the same point in *Hilary*, 9. Hen. 7. in debt by Vavisor, fol. 21.

[Vin. Ab. Condition,
 E. d. 1. Stra. 615.
 8. Mod. 71. Cowp.
 47. 1. Burr. 9.]

* [1. b.]

Error.

Infra, 3. El. 188. 2.
 4. Aff. 7. 22. E. 4.
 31. a. 8. H. 4. 5. 2.
 50. E. 3. 14. b. 26.
 Aff. 6. 43. Aff. 41.
per Perley. 34. H. 6.
 30, 31. 35. H. 6. 19. b.

(5) *Note*,] T was said, that at common law he in reversion might have a writ of error or attain on an erroneous judgment, or * a false verdict given against tenant for life after the death of tenant for life: but now by the statute 9. Ric. 2. ca. 3. he shall have error or attain in the life-time of tenant for life. And so in *Trin.* 18. E. 3. [25. Aff. 17. pl. 24. S. C.]

(3) In debt on bond *ut supra*, *Periam* and *Anderson*, acceptance of part of the money before the day of payment is a good plea, but not after the day. 18. E. 4. 15. 17. 20. (a).

(5) *Trinity*, 33. El. 456. Information against *Gray*, *WRAY* held. that at common law he in reversion should not have error or attain after the death of tenant for life, for these actions run in privity to the heir or executor. *Keilw.* 169.

(a) Now by statute 4. Ann. c. 16. s. 12. "If the obligor, his heirs, executors, and administrators, have, before the action brought, paid to the obligee, his executors or administrators, the principal and interest due by the condition of the bond, though such payment were not strictly

"made according to the condition, yet it may be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition, and had been so pleaded."—And with respect to annuity bonds see *Dougl.* 522, 522, 523.

a writ of error was brought by a man who had purchased certain land of another, who before was bound in a statute merchant, and the conufee had fued out execution of the fame land two years before the day of payment; and for this he brought the writ of error, and yet was neither party nor privy to the execution fued out (b). (6) And likewise in 32. a *scire facias* was brought by the grantee of a reversion againft one who had execution of the lands under a statute merchant; and alleged, as ground for his *scire facias*, that the conufee had received his right by reason of certain casualties, and nevertheless he was neither party nor privy. (7) So alfo if the parfon of a church have an annuity, and recover, and afterwards the benefice itfelf be appropriated to a religious houfe, the fuperior of that houfe fhall have a *scire facias*. And thus it is faid, if two benefices be united. And it is alfo faid, if a bond be forfeited to the king by reason of an outlawry, and the king give it to a ftranger, yet muft the action be brought in the name of the king, and not in the name of the grantee. But if the king grant his recognizance to another, he fhall fue upon it in his own name, and not in the name of the king, &c.

3. Cro. 325. 2. H. 7. 8. b. 5. E. 4. 8. 7. Co. 22. 2. Dy. 283. 2. 39. H. 6. 26. b. 19. H. 6. 47. 2. Keil. 12. Mo. 449. Staunf. Pl. Cor. 188. a. [Co. Lit. 232. b. note (1). 1. P. Wms. 452. Dy. inf. 30. b. pl. 208. Cro. Jac. 82. 179, 180. 1. Com. Dig. 404. (D.)]

17. Eliz. [4. Leon. 5.] *Arthur Hinningham's Cafe* adjudged accordingly. A difference is taken where he in reversion or remainder was party to the firft record by prayer in aid: in the former cafe he fhall have error during the life of tenant for life; in the latter, not. Plow. 241. b. 22. E. 4. 31. b. 3. Co. 4.

(7) *Infra*, 28. H. 8. 30. pl. 208. The king grants a bond forfeited for treason, and the grantee brings an information in his own name, without having words in the grant enabling him fo to do, and it was held good.

3. H. 4. 8. a. The king grants over an annuity that belonged to him, and the grantee brings an action in his own name. And 19. H. 6. 47. a. the king had a bond by outlawry of an obligee who granted it over, and befides that the grantee fhould fue in his own name; and he did fo, and it was held good. Lib. Int. 57. & 5. E. 4. 8. a. b. The king can grant an action after he has caufe of action, as of debt, and of things certain; but not of trefpafs, becaufe uncertain.

(b) In 1. Rol. Ab. 748. this is made a pl. 46c. the reason is given; and fee 2. query. But in *Brooker's Cafe*, Godbolt, Bac. Ab. Error (B) *per tot*.

Battaile against Cooke and Another

In *Quare Impedit* before induction the clerk cannot plead his patron's title to the advowson.

Fitz. Qua. Imp. 11. 125.
11. H. 4. 9. 38. H. 6.
14. b. 11. H. 4. 38.
32. H. 6. 28. b. Plow.
528. b. Dy. 293. a.
24. E. 3. 30. Dy. 283.
294. 19. H. 6. 20. a.
Com. 178. b. *Infra*,
27. Hob. 163. 319.
161. Jones, 161.
[Com. D.g. Tit. Plead-
er. (3. I. 9-)]

(8) JOHN BATTAILE brought a *quare impedit* against I. Cooke and Richard Cooper his clerk, which said Richard was presented by the said I. Cooke, but was not inducted; and the said I. C. made title to the advowson, through a grant from the ancestor of the plaintiff; and the said clerk would have pleaded the same plea, and was ousted; for the statute 25. E. 3. [stat. 3.] c. 7. permits the possessor to plead in bar; but before induction he is not the possessor, so out of the case in the statute; wherefore R. pleaded that he did not disturb, &c.

(8) 19. H. 6. 21. Before induction the parson has *jus ad rem*, but not *in re* †. [And see Black. Com. vol. ii. 312. Also, *infra*, 221.] *Nota*, 31. E. 3. Incumbent 6. that he cannot plead if he resign after the writ brought. And 11. H. 4. 38. b. as the law is, if he should be made a bishop. 7. Co. 26. 4. Co. 79. b. that after institution the parson may plead against a common person; for then, against all except the king the church is full, and provided.

† Orig. *jus in re, sed non ad rem*.

Michaelmas Term,

6. Hen. 8.

Oliver against Emsonne.

The attainder and imprisonment of the grantee of an annuity *pro consilio impendendo* charged on lands, so that the grantor could not go to and receive advice from him, is no good plea in bar to an avowry for arrears.

* [2. a.]

(1) IN REPLEVIN brought by John Oliver v. T. Emsonne, who avowed the taking by reason that a stranger was seised of a manor of which the place, &c. in fee; and being so seised by his deed, which he shewed to the Court, granted an annual rent of twenty shillings to the said T. for the term of his life *pro bono consilio suo impendendo* *, with a clause of distress upon the said manor; and for twenty shillings being

(1) Benloe's Rep. ca. 2. [34. pl. 55.] annuity granted *pro consilio impenso* to one for life of the grantor may be granted over, and the grantee may maintain a writ of annuity without averring the life of the grantor †.

21. E. 4. 83. b. annuity *pro consilio impendendo* cannot be granted over unless granted to him and his assigns. *Quere* thereof 36. Ass. 3. Common without stint, or a corody uncertain, cannot be granted over, unless granted to him and his assigns; *secus*, if certain. Post. 65. a. 21. E. 4. 20. a. 84. a. [Dallion 5. pl. 10.] A grant to one and his heirs of an annuity, that may be granted over; *quere*, for the grantee has no remedy unless by way of action; and *quere*, if the annuity were granted other than for life. Plow. 379. b. that an office granted to one and his heirs may be granted over.

† Orig. *grantee*.

in arrear for one year he avowed, &c. To which the plaintiff replies, that the said *T.* was attainted of treason before certain justices, who committed him to the custody of one *O. T.* then *Lieutenant of the Tower of London*; by virtue whereof he remained in prison for the space of one year then next ensuing; during which time the said grantor for divers businesses stood in need of the counsel of the said *T.* and would have gone to him to get his advice touching those businesses; but by reason of that judgment and imprisonment the said *O.* was prevented from going to the said *T.* in order to require and have his advice in that behalf; and so could not have the counsel of the aforesaid *T.* in the cause aforesaid, by the default of the said *T.*; whereupon the avowant demurred in law. (2) And by the opinion of ALL THE COURT *T.* had a return; for by the attainder the rent was not forfeited to the king, for it was incidental to the cause for which it was granted; and that is the trust and confidence he reposed in him to take his counsel, the which he could not grant to another: and for the same reason he could not forfeit it. As if a man were created duke, and, for the maintenance of his dignity, the king granted him 20l. as an annuity, he could not grant that to any other, for it is incidental to his dignity. And so, notwithstanding the attainder and imprisonment, still he might have given his advice, if the other had come to him, as well as he might before. And in the plea no default is assigned in him.—Wherefore, &c.

(2) 23. H. 6. Memb. 23. patent rol. An honor to one and his assigns.

(3) **I**N the exchequer chamber this case was reported to be as follows: In debt against executors, they pleaded *plene administraverunt, &c.* upon which the parties came to

(1) Plow. 382. a. Dy. 65. a. 41. E. 3. 27. b. 6. Co. Sir Geo. Reynold's Case. 28. H. 8. 7. b. 2. Inst. 9. 1. Inst. 204.

3. H. 6. 47. a. Plow. 381. Perk. 21. pl. 99. Opin'o.

10, 11. 21. E. 4. 14. 1. 83. & 20. 19. H. 8. 10. 19. H. 6. 42. Per Ascuc, Bro Annuity, 19. Davis' Rep. 2. & 4. b. Dy. 7. b. 76. a. 21. E. 4. 20. b. *Infra*, 65. a. Co. 7. 28. b.

[Godb. 397.]

Jon. 124. 9. E. 4. 48. a. Per Choke, 21. E. 3. 7. Annuity, 31. 38. H. 6. 23. a. Per Danby. Plow. 456. Dy. 369. *Nota*, 21. Af. 18.

[See Hen. Bl. 627, 628. 2. Black. 1140.]

(3) *Easter*, 4. Jac. B. R. *ϕ* Tiler *v.* Middleton, That executors, after satisfying special debts, may retain for a debt due to themselves on simple contract. An executor, having twenty pounds of the goods of his testator in his hands, procured a bond of the testator's for twenty pounds to be cancelled, and made a new bond for the same debt to the same obligee. HALE moved the Court that this administration might support a *plene administravit*. WRAY and CLENCH, as then advised, thought that it might. KEMP cited *ϕ* Sir Richard Woodhouse's case to this intent.

Executors may redeem with their own money goods pledged by the testator, or pay his debts,

M. 27. & 28. or 28. & 29. El. Roll. 2623. between Stampe and Hutchins. [Cro. Eliz. 120.] Testator gave a bond to *B.* for one hundred pounds, and the executors made a bond for the same debt to the same obligee for the payment of it to *B.* and, Whether by that bond the executors have property in the goods to such value, so that they may retain? was the question. And *M.* 30. & 31. El. the opinion of all the Judges was, That they might retain, and the goods should not be assets. Yet 30. & 31. El. *ϕ* Whipper's case, it was agreed by WRAY, SHUTE, and CLENCH, Keilway, 50. a. if an executor *de son tort* pay debts with his own money, still he cannot retain the goods to himself against the rightful executor. [Vide Cro. Car. 89. Cro. El. 630. 1. Sid. 76. Carthew, 104. 2. Term. Rep. 100. 3. Term Rep. 387. 2. Hen. Bl. 26. 2. Bl. Com. 511. Swinburno on Wills. 460. 461.]

and retain the value of what they pay.

20. H. 7. a. b. Plow.
184. 186. a. Keil. 26.
20. H. 7. 5. a.
The case of Langstone
against one Dyne and
his wife executrix of
one Redye.

T. 19. H. 7. Roll.
330. but not adjudged;
for I saw the record
thereof, *simile*, H. 10.
H. 8. Roll. 322. be-
tween Cleidon and
Spencer.
[Benl. 11. pl. 8.]
Mo. 2. 1. And. 24.
Went. 110.
Post. 187.

[4. Term Rep. 640.]

Went. 128. 3. Elz.
187. b. Ful. Paral.
lib. 2. f. 36. Litt. fol.
90. b. 14. H. 8. 7.
1. Co. Rep. 25. a.
11. H. 6. 35. b.
3. Infl. 236. a.

* [2. b.]

[Co. Lit. 113. a. Mr.
Hargrave's note (2)].

Davis Rep. 19. That
was one reason for the
invention of money.

Bacon, fo. 5. c. 9.

21. E. 4. 21. b. *contra*,
per Choke. 4. 10. H. 7.
11. a. 18. 8. Afs. 37.
9. E. 4. 8. b. 21.
5. Co. 30. Fitz. Da-
mage, 18. & 92. 4.
H. 7. 14. b. 3. H. 7.
14. 24. E. 3. 50.

[Carth. 104.]

issue; and at *nisi prius* at *St. Martin's* it was shewn to the jury in evidence on the part of the plaintiff, in order to prove assets of the goods of the deceased remaining in their hands, that they had divers goods, *viz.* plate and other household stuff, and shewed the certainty. And for the executors it was alleged, that the plate was pledged by their testator in his life-time to one *J. B.* for its full value; and that after their testator's death they redeemed the plate out of *B.*'s possession with their own money, for this reason, that there were not goods of the testator sufficient to redeem them.

(4) And as to the household stuff, they had paid out of their own money for debts of their testator as much and more than the value of the stuff. To this evidence the plaintiff demurred, and by consent the jury was discharged. And BY ALL

THE COURT it was holden, that the evidence for the executors was good, for the executor may well pay the debts of his testator out of his own money, and retain so much of the effects of his testator in his hands to his own use as amounts to the value of his money. (5) And it is not like the case where a man wills his executors to sell his land; there they cannot retain the land in their own hands, &c. because the will is so that they ought to sell it. But the will of the testator is not, that his * executors shall sell his goods, but that they shall dispose of the goods for the soul of the testator to the best of their discretion. If then they do not waste the goods, but convert and apply them to the best advantage of their testator, that is well enough. (6) And it is lawful for executors to redeem the pledges of their testator with their own goods when they have none of their testator. And even if they have goods which were of their testator, yet peradventure they have no money of their testator, and he who has the goods in pledge will not receive goods, but money. (7) And so if one to whom the testator was indebted will not receive goods in recompence, then is it lawful for the executors to pay him out of their own money, and retain so much of the effects of their testator; for it may be there was a penalty which would have been forfeited before they could sell the testator's goods, And so reason directs that a man shall be reimbursed in that which he hath legally paid. As if a man disseise me of land out of which a rent-charge is issuant, which has been in arrear for several years, and the disseisor

disseisor pay it, if the disseisee recover in an assize, the rent that the disseisor has paid shall be recouped in damages.—Wherefore, &c.

(8) **A** N alien living in France brought a writ of debt in the common pleas, and the defendant, by Row, *Serjeant*, demanded judgment if he should be answered, for that he was born out of the kingdom, *viz.* out of the allegiance of our lord the king. And SHELLEY, FITZJ., and BRUDNEL, *Justices (absente ENGLEFIELDE)*, held this to be no plea: for notwithstanding he is an alien, yet he shall be received in all personal actions, if there be no war between this realm and the kingdom to which the alien belongs, &c. for then he is an enemy of our lord the king, in which case he shall have no benefit from his laws. But in real actions, the plea aforesaid is good, for no alien can have land within the realm unless he be a denizen: *quod nota.* And FITZJ. said, that he learnt this distinction first from VAVISOR, *Justice.*

An alien living in France may bring a personal action in our Courts in time of peace; otherwise in time of war.

Co. 7. 17. a. 31. H. 6. 32. Stamford. Prerog. 39. Litt. 198. 42. E. 3. 2. 9. H. 4. 8. a. 22. Ass. 25. 32. H. 6. 23. b. 19. E. 4. 6. a. 1. Inst. 2. b. 129. b. 38. H. 8. B. N. 317. Dy. 283. b. Fitz. Alien. 8. Bro. Alien 10. Tit. Dower, 179. 9. H. 4. 8. a. Litt. 43. b. 3. H. 6. 55. a. 7. E. 6. B. N. 443. Bro Nonability, 40. 62. 1. E. 6. B. N. 375. Dy. 144. b. 11. H. 4. 26. 7. Co. 26. 1.

Bulf. 134. Yelv. 198. 1. Benlo. 10. [1. Bl. Com. 372. 1. Salk. 46. Dougl. 641. & 650. note 132. 2. Black. Rep. 1324. Ld. Raym. 283. 1. Bac. Ab. fol. 84. 3. Burr. 1741. 2. Str. 1082.]

(8) By the statute of 27. Ed. 3. 2. it is enacted, That all merchants aliens, not enemies, may safely live in this realm with their effects as long as they please; by which statute it was agreed in *Lent*, 35. El. at *Lincoln's Inn*, at the reading of *Mr. Tarborough*, that a merchant alien may take a lease of houses with gardens at will, but not leases for years, and cannot take leases for years of any lands; for the said statutes intend only houses for their habitation, during the time of their traffick. But afterwards, by the statute 1. R. 3. c. 9. it is ordained, that no alien, being artificer or handicrafts-man, should take or occupy any house or room, and live in it, or sojourn in it with other aliens, but that all aliens artificers should depart this realm, unless they be servants to the subjects of this kingdom, according to their craft. If an alien take a house for his habitation, and pass beyond sea, and do not return, the king shall have it, unless there be servants residing there during the time. And that an alien cannot purchase copyhold lands, because he hath no power to retain them, unless solely for the king, and the king cannot hold of any one; and therefore if he purchase, it must escheat to the lord of the manor: so resolved by *Harrison*, lecturer of *Lincoln's Inn*, holden 1632. [1. Bl. Com. 371.]

E. 11. E. 3. Roll. 87. There was a statute acknowledged to an alien friend-merchant; he had the land extended upon the statute, and office being found for the king, it was adjudged, That an alien friend-merchant might hold land upon an extent, and upon office it should not be taken from him, [1. Bac. Ab. 84.] and so within 13. E. 1. *de mercatoribus*; but upon ouster, he shall have an assize. And so *GIANVILLE*, *Justice*, seems to think in his reading; and the above case was debated three years. H. 13. E. 3. *accordant. Quere*, If an alien friend ought not to have protection, for 5. E. 3. 31. one who brought trespass said, he was under protection. [7. Mod. 150.]

If tenant in tail levy a fine with proclamations, and the five years elapse during his life-time, he afterwards dying, his issue shall be barred by that fine.

19. H. 8. 6. b. S. C. Bro. Fine. 1. Plow. 356. West Presidents, Fines, fol. 67. § 182, 183. 186. 11. Co. 78. b. 3. Co. 87. a. Godb. 301. But now stat. 32. H. 8. c. 36. has explained this to the contrary. See the preamble, 30. H. 8. B. N. 244.

3. Co. 51. a. 9. b. 1. Cro. 525. 325.

Hob. 333.

(1) **B**EFORE all the Judges at *Serjeant's-inn* a great question was agitated, which was thus:—Tenant in tail levied a fine of his land with proclamations, and the five years passed during his life-time, and * afterwards he died; Whether his issue should be barred by that fine or not?

ENGLEFIELD, SHELLEY, and CONINGSBY, thought that the issue shall not be barred; for the statute 4. H. 7. c. 24. is, that such fine shall be final end, and shall conclude as well privies as strangers to it, saving to all persons and their heirs (other than such as shall be parties to the fine) their right interest, &c. which they had on the day of engrossing the fine, so as they bring their action or enter lawfully within five years after the engrossing; saving also to all other persons such right, title, and interest in the said tenements as should first grow, remain, descend, or come to them after the fine engrossed, or proclamations made by force of any estate tail, or other cause and matter made before the fine levied: (2) so by this last saving, &c. the issue in tail is aided, for he is the first to whom the right descends after the fine engrossed, And although the father was privy to the fine, yet the issue is neither privy, nor party, to the fine; for he claims the land by the donor, and not by the donee, notwithstanding that he ought to convey himself to the land through his father. And put, that the brother of my father disseise my father, and then levy a fine with proclamations, and my father die, then my uncle die within the five years, that fine will not bar me; yet the exception in the statute shall not aid those and their heirs who were parties or privies to the fine, but only those who were strangers to the fine; and although I am heir to him who levied the fine, yet my title to the land is not as heir to him, but as heir to my father; so I shall not be barred, (3) And it is not like where my father disseises my grandfather of

Vide Saul and Clarke's case, E. 1. Car. B. R. [Sir Wm. Jones, 208.]

(3) *Halme and Gee*, K. B. 34. Eliz. [Mo. 301. Poph. 112.] It was agreed, that if the discontinuance of an estate tail levy a fine, the issue shall not have five new years. So if a false recovery be had against the tenant in tail, and the recoveror levy a fine, the issue shall not reverse it after five years; it is otherwise if the father disseise the grandfather, and make a feoffment in fee, the son shall avoid it.

his

his land which he holds in fee, and levies a fine, then my grandfather dies, and afterwards my father dies, now that fine bars me; for I cannot convey this fee simple to myself, but by him who was party to the fine, viz. as heir to him; so I am privy to that fine. Wherefore, &c. — FITZJAMES, BRUDNEL, FITZHERBERT, BROOKE, and MORE, to the contrary, for the intent of those who made the statute, was (as appears by the words of the said statute) that such fine, &c. should be a final end. And besides that such fine, &c. shall conclude as well privies as strangers; and if no exception had been made in the statute by the above-mentioned words, all persons generally, as well issues in tail as others, would have been concluded, &c. (4) And in the first exception in the statute, none is aided except a feme covert, &c. And in the second exception or saving, all strangers to the fine, who have title to the land at the time of the fine levied, are aided, if they bring their action, and shall have made their lawful entry within the five years after the fine engrossed; and the issue in tail is not aided by these two exceptions or savings. And in the third saving or exception in the said statute is comprized, "that all * other persons, &c. as in the "statute (which shall intend all strangers to the fine, but "not privies) to whom such right, title, or interest first grows, "remains, descends, or comes to them after the fine engrossed, by force of a gift in tail, or by another matter or "cause, shall have such right, &c. saved to them, if they "take, &c. within the five years after the title accrues to "them, &c." (5) By which words, all strangers to the fine, to whom a remainder in tail, or to whom a descent in tail, first accrues after the engrossing, shall be aided, &c. As, if tenant in tail discontinue, and the discontinuee levy a fine with proclamations, and the five years pass, then the tenant in tail die, his issue shall have another five years, and shall be aided by those words of the statute. (6) And the intention of the makers of the statute was, not that such as claim by the same title that his ancestor, who levied the fine, had, shall be aided, &c. for such issue in tail is privy to the fine levied

2. H. 4. 20. 39. H. 6.
43. 8. H. 5. 7. 21.
E. 4. 81. Fitz. Entre
congeable, 21. Lit. 147.
3. Co. 90. Mo. 351.

Plow. 361. Dyer, 234.
3. Co. 87.

* [3. b.]

Co. 374. 2. West.
Pref. Fines fol. 67. sect.
182. 1. Cro. 157.
Bro. N. C. 144. Bro.
Fines 107. Dy. 374. b.

(5) Note, 3. Co. 87. a. 10. Co. 48. b. which right first accrued to him, because after his feoffment, the tenant in tail has no right. C. B. N. & 32. El. in one *Davies'* case, it was adjudged, that if the lessee for life, remainder in fee to another, levy a fine, he in remainder shall have five years by the title and forfeiture; and after the death of lessee, he shall have other five years, for the title accrues to him by the death and determination of the estate of the lessee.

[Co. Lit. 121. a. Mr. Hargrave's note (1). Cruise on Fines, 155, 156. And see Dougl. 25. 264.]

by his ancestor, through whom he shall make his descent, although he be not party to the fine, and all privies are concluded by such fine; and so such issue in tail shall be barred by a fine by his ancestor, &c. And in this case it was agreed by all the Judges, that if he who is a stranger to the fine, to whom a remainder in tail, or other title, first accrues after the fine, do not put in his claim within five years after &c. his issue is barred by that fine for ever. *Quod nota.*

Trinity Term,

19. Hen. 8.

If a man appoint *A. & B.* executors, though with a proviso that *B. do not administer*, the proviso is void, and they shall sue jointly.

19. H. 8. 8. b. S. C. 3. H. 6. 6. b. 7. a. Fulb. Parral. lib. 2. fol. 6. 8. Bro. Executor, 155. Perk. 340. Litt. fol. 84. a. 13. H. 7. 23. 1. Inst. 206. b. 21. H. 7. 24. b. 7. H. 6. 43. b. 9. Eliz. 26. 4. Perk. 131. 21. H. 7. 31. 2. Co. 84. b. 10. Co. 38. 13. H. 7. 17. b. T. 3. Car. Cro. 293. Went. 17. Mo. 12. 10. E. 4. 1. Fit. Executor, 26. 8. E. 4. 5. 35. H. 6. 36. Nota Bendl. Rep. ca. 21. 2. R. 3. 3. b. a. Keb. 709. [Wentw. 12. Godolph. 78.]

* [4. a.]

(7) *B.* and a woman, as executors of *C.* brought an action of debt on a bond; and the will was, that the said *C.* had made the said *B.* and the woman executors, *proviso, that B. shall not administer his goods.* Wherefore defendant demands judgment of the writ brought in both their names.—SHELLEY. The writ shall abate; for although when a man makes a grant or gift to a stranger, with a proviso that is contrary to the grant or gift, the proviso is void for the advantage of the stranger (as if a man enfeoff another, provided that he shall not have the land, or proviso that his heir shall not inherit, this proviso is void); yet in this case, the making of executors is not for the advantage of the stranger, but merely for the testator's advantage, so that he may well, in the conclusion of his will or testament, discharge him whom he has made [executor] in the beginning of his testament. (8) And every last will shall be construed according to the intention of the testator; and in this case, it is expressed that *B.* shall not administer. Wherefore *B.* is discharged from the executorship as much as if he had said that *B.* should not be executor.—FITZHERBERT. The writ

(8) *F.* 23. Eliz. *C. B. Alice Frances' case.* *A.* wills that if his wife suffer *S.* to enjoy *Blackacre* (which was part of his wife's jointure) for three years, then she should be his executrix, or otherwise *S.* to be his executor. And by all the Judges, except *ANDERSON*, it was agreed, that the wife was executrix immediately before the expiration of the three years; and that on disturbance of *S.* by the wife within the three years, the executorship should be determined, and transferred from the wife to *S.* [1. Leon, 229. 33. El. C. B. *Jennings and Gower's case.*]

is good; for every testator may sever the power of his executor. As if his will had been, "that *B.* and *C.* should be "his executors, and that *B.* alone should administer his plate "or his property in such a diocese, and *C.* his other property, "or that *B.* alone should administer his goods, and *C.* receive "his debts, and bring actions, and give acquittances for his "debts;" this is good, and they shall act severally according to the power given to them by their testator and not otherwise. (9) So here the woman and *B.* are made executors, and all the power of the executorship is not taken from *B.* by the intention of the testator, by these words, that *B.* shall not administer his goods, for he may bring actions.—ENGLEFIELD. I do not agree with the case put by my brother FITZHERBERT; for then this inconvenience will ensue, that *B.* will have an action to recover the goods out of the possession of *C.* and perhaps the testator was indebted to *F.*; and *F.* brings an action against *C.* and *B.* because both are executors, and *F.* recovers, then *C.* shall be charged with the debt, and cannot hold the goods by his discharge, which is unreasonable (10); and therefore it seems to me, that when once they are made executors, such several powers limited to them afterwards are void: for when the intention of a man who makes his testament is contrary to law, such intention shall be holden void: as if a man devise land to *H.* in fee, and if he die without heir, that *M.* shall have the land, this devise is void as to *M.* for a fee simple cannot depend upon another fee simple by the law. So also is the law, if the devise be made to the *Abbey of St. Peter's of W.* where the foundation is the *Abbey of St. Paul.* And in the case at bar, it cannot be taken that the intention of the testator was, that *B.* should not be his executor, as if he had said at the end of his testament, that *B.* should not be executor; for the testator put a confidence in *B.* as appears by the words of the testament. And although his intention were, that *B.* should permit the woman to order the goods, yet this is at the pleasure

Bro. devise, 2. 12.
H. 6. 13. 6. Per
Strange. Plow. 235.
239. 248. Dyer 33. a.
337. a. 19. El. 357. a.
3. Mar. 122. a. 19.
H. 6. 74. b. 1. Co.
85. b. & 122. 357.
12. E. 4. 3. Co. on
Litt. fol. 18. a. Dyer,
157.
[1. Rol. Ab. 914.
Wentw. Off. Ex. 13.
14. Godolph. 79.]

(10) 21. H. 6. 6. b. per Paston. "I will that *A.* and *B.* be my executors, and that *I.* and "*K.* be executors; *A.* and *B.* for the disposition of my goods:" there all are executors. LORD CHIEF JUSTICE FLEMING would not permit a special verdict to be found, where the case was that *A.* devised to *B.* for life, remainder to *C.* and his heirs, and afterwards devised to *B.* if *C.* died without heir; for he said it was ruled and agreed, upon conference by all the Justices, that if *C.* died without heir, *B.* should have the land. *Quare* the case. At the same time it was said, that it was adjudged in K. B. 7. Jac. that if a man devise *Blackacre* to *A.* and his heirs, and afterwards in the same testament devise the same *Blackacre* to *B.* and his heirs, there they are joint tenants in fee, and the last devise to *B.* is not void.

of B. and the intention is void: and therefore the writ is well brought in both their names. And hereto agreed
BRUDNEL, *Chief Justice*.

* Trinity Term,
24. Hen. 8.

Rushden's Case.

Debt lies for rent against the original lessee of a term, though he have granted over parcel of the land, and his grantee have made a feoffment of that parcel.

3. Co. 23. 4. Litt. 517, 518. Co. 8. 79. b. 8. Eliz. 247. b. 5. E. 3. 56. B. Litt. § 547. B. N. C. 97. 14. H. 7. 4. b. 10. H. 6. 11. b. 2. E. 4. 11. a. 1. Keb. 72. 20. E. 4. 9. a. 34. H. 6. 21. a. 28. H. 8. 14. a. Plow. 423. Bro. det. 8. 171. Dyer, 212. b. 3. Co. 22. Cro. 65. a. Bro. Extinguishment, 4. 8. Co. 15. b. 5. H. 7. 19. a. 18. H. 8. 2. a.

(1) IN the exchequer chamber before all the Judges of England, the case of *Rushden*, of *Lincoln's Inn*, was reported as follows: A man makes a lease to another for a term of years of certain land rendering annually a rent: the lessee grants parcel of his land to one *W. Mason*, the which *W.* enfeoffs a stranger of that parcel; and because the rent was in arrear, the lessor brings an action of debt against the first lessee. And the question was, 'Whether the action will lie, or not?' (2) And on the part of the plaintiff it was said, that the action well enough lies, for the first lessee is tenant to him in reversion, and inasmuch as he has not granted his interest in all the lands to the said *W. M.* the privity between them always continues. For if lessee for term of years grant his whole term to a stranger, a release made by the reversioner to him is good, because of the privity; but if he grant only parcel of the term, it is otherwise: so here, when the lessee grants only his interest in parcel, he still remains tenant to the lessor. (3) And *HENDLEY, Apprentice*, also argued to the same intent, that the action lies against the first lessee; for an action of debt for rent reserved upon a lease for years is always grounded upon a privity, and if the privity fail, the action fails: and so it is adjudged in 18. H. 6. [1. a.] that if a man make a lease of land for years rendering rent, tho' the lessee never enter, nor occupy the land, yet action of debt lies, because of the privity. But in 9. H. 6. [16. b.] a man makes a lease

(1) Note the case ruled for law in C. B. that if lessee for years, rendering a competent rent, make a feoffment in fee, yet the privity of the contract is not so gone but that the lessor may have debt against his lessee; for otherwise three or four years rent may be in arrear, and the lessor without remedy by a private feoffment, which is unreasonable; but by good opinion, lessor shall not have waste after such feoffment, because he may enter, and there is no such inconvenience.

for term of years rendering certain rent, and the lessor grants the reversion to a stranger, the grantee shall not have an action, because he never was privy, but a stranger to the first lease; (4) but when the law makes a privity, it is otherwise: as if a lease be made to one for a term of years rendering a certain rent, and the lessee make his executor, and die, action of debt lies against him for the rent, because he is made privy, by the law. Then it is further to be considered, whether the rent be apportionable or not, and it seemed to him that it is not; for at the common law there was no apportionment by the act of the party, but only by the act of the law. For if the tenant before the statute of *quia emptores terrarum* had made a feoffment in fee of part of the tenancy, the lord might distrain in that part for the whole rent, and the statute only aids feoffments; then leases remain at common law. (5) But at common law if a man had made a lease for a term of * years of two acres of land, one in borough English, and the other in gavelkind, rendering a certain rent, and had issue two sons, and died, in that case the rent should be apportioned, because this rent descends to them by the course of the law: and so it is if the lessee make feoffment of parcel of the land leased to him, and the lessor enter for a forfeiture into that parcel, in that case the rent shall be apportioned, because this title of entry is given to the lessor by the law; but in this case if the rent be apportioned, it would be by the act of the lessee, which can-

[Carth. 161.]
21. H. 6. 24. b. Co.
Litt. 148. a. Dyer, 92.
a.
Fitz. Avowry, 241.
Bro. Extinguishment,
48. B. N. C. 512.
Bro. Appurt. 16. 28.
18. 47. E. 3, 4. 6.
22. Aff. 52. 10. H. 7.
10. b. Perk. 677.
Br. Acceptance, 13. a.
Perk. 671. 8. Aff. pl.
18. 45. E. 3. 15. b.
Cro. 125. Dy. 326.
[4. Bac. Ab. 369.]
Fit. Avowry, 206. Dy.
56. a. 81. b. 89. a.
4. Co. 73. a. Bro. Ex-
tinguishment, 52. 3.
Co. 22. b. 4. Co.
120. b. F. *quid juris*
clamat, 20. 21. E. 4.
22. a. 9. Aff. 27.
14. H. 8. 11. b. 9.
E. 4. 1. a. 7. E. 6.
* [5. a.]
82. a. 12. H. 8. 11. b.
9. E. 4. 56. 82. 112.
5. Co. 55. 7. H. 6.
26. a. 29. Aff. 64.
3. Cro. 771. 1. Inst.
148. a. Cro. Eliz. 793.
3. Keb. 215. Inst.
307. a. 16. E. 3. F.
qua. imp. 146. 20. 22.
E. 4. 14. b. 9. a.
Cro. 169. 14. H. 6.
24. 33. H. 6. 33. a.
N. B. 32. a. 33. 2. H.

(4) Note, that M. 33. & 34. Eliz. B. R. in *Goddard's case* [Owen, 10.], it was holden, that by confirmation for life to lessee for years of parcel of the lands, the whole rent is extinguished; which is law, as I believe: for M. 43. & 44. Eliz. B. R. in the case of *West v. Laffett* it was adjudged to the contrary. [Cro. Eliz. 851.] *Wiseman's case*, of the *Inner Temple*, 29. Eliz. C. B. [See Godb. Rep. 95. pl. 107.] A man seized of three acres in fee makes a lease for years reserving rent, and then devises the reversion of two acres to a stranger, and the reversion of the third acre descends to the son, who brings debt for twelve-pence. And it was held by ANDERSON and KODES, that all the rent was gone, and no apportionment; but it was said that it was adjudged to the contrary in B. R. E. 28. El. Rot. 341. and another case, 16. El. Rot. 1544. C. B.

(5) It is commonly holden at this day, that if the lessee make a feoffment, the lessor shall have debt against him, or otherwise the lessee, by his own act, may determine the lease, and compel the lessor to enter for forfeiture, which is inconvenient.

Lessee of a house rendering rent, and because the rent was too high he makes a feoffment of the house to A. yet debt was maintained by the lessor against the lessee during the term, and so adjudged, as I was informed by Mr. Duke, Benchor of *Lincoln's Inn* †, who put this case by the fire-side there, of land in the case of *Richard Colton*, who is now Chief Baron in *Ireland*, and who was punished in the star-chamber for his indirect practice.

† I doubt of this translation; for it is in orig. "*que mist ceo case a few la de terre le case de Richard Colton que est ore Chief Baron in Ireland, et que il fait port en le star-chambre par son indirecte practice.*"

7. a. 2. 4. H. 7. 10. not be, &c. (6) And on the other side it was argued,
 5. H. 7. 36. 9. E. 4. That by the feoffment made by the said *W. M.* the reversion
 3. Dy. 48. b. 9. E. 4. of that parcel is out of the lessor; and so long as the rever-
 39. b. 19. 21. H. 6. sion is out of him, he cannot have the rent of that parcel, for
 33. 9. 3. Co. 3. 2. sion is out of him, he cannot have the rent of that parcel, for
 23. *Nata*, 19. R. 2. the reversion is the principal, and the rent the accessory,
 Treas. 55. 5. H. 7. and before he has recovered the principal, he cannot have
 38. a. 43. E. 3. 25. the accessory. As if a man seised of a manor to which an
 Dy. 247. b. advowson is appendant be disseised, and the disseisor die
 seised, now if the church become void, the disseisee cannot
 present before he has recontinued the manor; otherwise it
 is, if it became void during the life of the disseisor, because
 his entry was then lawful into the manor: and so, inasmuch
 as the reversion is out of him, he cannot maintain this action
 of debt.

(6) *Nov*, of *Lincoln's Inn*, put these cases: that if lessee for life, paying ten shillings rent, make a gift in tail without saying more, the donee does not hold by the ten shillings; for the lessee is not chargeable over as long as this estate continues. This seems the law of the lessee for years, notwithstanding that he be chargeable, but this (as he says) is in respect of the contract, and not *ratione terre*.

19. R. 2. Fitz. Trespass. 55. If a man be seised of a manor with a villein regardant. he cannot retake the villein before he hath recontinued the manor.—*PER CUR.* It seems the action is well maintainable against the first lessee, although he had granted over all his estate: and I have heard that it is adjudged—and notwithstanding that the reversion of part is out of him, yet the action lies upon the first contract. *7* 3. Cro. 23. [See Cowp. 768. Dougl. 183. 187. note 59.]

(1) **A** MAN seised of one acre of land had issue two sons, and died; and the younger disseised the elder, and the elder brings assize, or other action on his own seisin; and the other pleads in bar; and they are at issue; and found against the plaintiff by false oath: after which the younger grants a rent-charge, and before attain brought by the elder, the younger dies without issue; so that the land descends to the other. Now WILLOUGHBY asked of the Judges, What remedy for the elder, to discharge his land? And it seemed to them that he has no remedy, for now he is in as heir of his brother; and the attain fails, for that the defendant, against whom the attain should be brought, is dead; and he shall not be remitted contrary to the record.

A man shall never be remitted to a title which stands contradicted by a record.

Nota prejudice by act in law. Finch. 112. B. N. C. 119. F. *faux de recovery*, 46. Dy. 35. a. 376. b. 44. Aff. 35. 19. 22. H. 6. 59. 28. 46. E. 3. 5. 8. H. 7. 7. b. 6. 8. 10. Co. 8. 3. 38. 19. H. 8. 5. 44. E. 3. 30. Remitter shall not be against a record.

[Godb. 312. & see Ca. Lit. 349. b.]

(2) **Y**ORKE puts this question upon the statute 21. H. 8.

[c. 7.] which is, "that if any master or mistress deliver any goods to his servant to keep, who with- draws himself, and goes away with the goods to the intent to steal them, or if he embezzle the goods of his master, or convert them to his own use, if the goods be worth forty shillings, it shall be felony." And a man delivers a bond to his servant to receive £.20 of the obligor, and the servant receives them, and after that goes away, or converts them to his own use, Whether this be within the meaning of the statute or not? And by the better opinion it is not, for he did not deliver to him any goods; for a bond is not a thing in value, but a *chose in action* (3). And ENGLE-

A bond is not goods or chattels within the statute 21. H. 8. c. 7. touching servants embezzling their masters goods. 13. E. 4. 9. Stat. 33. H. 8. c. 5.

* [5. b.]

Rastal Felony, 10. Plow. 399, 400. 3. Inst. 105. Crompton, 1. P. 35. b. 12. H. 8. 4. a. Pollard, 3. H. 7. 12. b. 21. H. 7. 14. b. [1. H. H. P. C. 505, 506. 668. 1. Hawk. Pl. C. 138, 130. 2. H. H. P. C. 366, 367.]

FIELDE

(1) The indictment upon this statute was, "*feloniously carried away*," without saying *feloniously took*; and the statute does not make the taking, but the carrying away, felony. If I bail goods to one to keep, and afterwards I retain the same person in my service, who goes away with them, this is not felony, 21. H. 8. because he was not my servant. Bac. fol. 4. c. 8.

In the case of *Kilset v. Nicholson*, T. 38. Eliz. B. R. [Cro. El. 478. and 496.] it was agreed by three Judges, that by a grant of all goods and chattels, a bond passes. FENNER, *contra*. That the parchment and wax would, but not the duty comprized in it. Co. Litt. 212. b.

(3) 13. E. 4. 9. It was holden by all, except NEDHAM, that where goods are bailed by a man, there he cannot take them feloniously.

The statute 21. H. 8. excepts apprentices of any age, and servants under eighteen years old.

Crompton, 30. which is the practice at this day. 10. E. 4. 14. b. 13. E. 4. 10. 10. E. 4. 1. 2. Roll. 58. cont. Yelv. 68. 4. H. 7. 10. 11. E. 4. 1. Stamf. Prerogat. 45. 22. E. 4. 12. b. 39. H. 6. 35. b. 36. H. 8. 59. b. Perk. 115. Dy. 59. b. [2. Bac. Ab. 395. 655. in notis. Sheph. Touch. 93. 94. 240. 1. Br. Chan. Caf. 128.]

FIELDE said, that if a man deliver to his apprentice wares or merchandizes to sell at a market or fair, and he sell them, and receive money for them, and go away, that is not within the statute; for he had not it by the delivery of his master, nor goes off with the things delivered to him: *Quare*. For the money was not delivered to the servant by the hands of his master, but of the obligor. But if one of my servants deliver to another of my servants my goods, and he go off with them, that is felony; for it shall be said my delivery. And **FITZHERBERT** said, that in the case of a bond, by a gift of *omnia bona et catalla* bonds pass.

old. Note, That it is said in *Caylie's* case, 8. Co. 33. That these words; *goods and chattels*, in their proper natures, do not extend to bonds being *choses in action*; and such things by act in law shall not be transferred to a common person. 10. Co. 48. b. E. 3. Jac. B. R. *Yannel* brings an action of trover against *Roberts*, and declares for *goods and chattels*, viz. a bond in which *I.* was bound to the plaintiff in forty pounds. It was adjudged an insufficient declaration, because a bond is not goods or chattels; for by cancelling, the nature of it is altered from a chattel.

Writ de *idemnitate nominis*.
F. N. B. 267. 27.
H. 8. 1. 1. 2. H. 5.
5. 5. Fulb. 267.

Note, THAT it was agreed by THE COURT, That a man shall never have a writ de *idemnitate nominis*, where there are two of the name of *Baptism*; but always it lies of surnames (a).

(a) This writ is now obsolete.

Michaelmas Term, 26. Hen. 8.

Knolles' Cafe.

A rent may not be devised, and being but a chattel, shall go to the executors.

(1) **MONTAGUE** moved this case: One *Thomas Knolles* was seised of lands devisable (b), and made a lease for years rendering rent, and devised this rent to a

(1) M. 40. and 41. El. B. R. *Ardes and Watkin's* Cafe, [Cro. Eliz. 637. 651. Mo. 549.] adjudged, that the devise is good, and the devisee may bring an action of debt for the rent. See *Lambert's Perambulat. de Kent* 547. 22. Ass. 78. by judgment, that a rent out of land devisable, is devisable. 4. E. 3. 32. F. Dower 113. adjudged, that a woman shall be endowed of a moiety of such rent according to the custom, and there holden, that if it be a novel

(b) Now in consequence of the statute 32. H. 8. c. 1. explained by 34. H. 8. c. 5. and the subsequent statute of 12. Cha. 2. c. 24. all lands are devisable except copyhold

lands. In case of copyhold lands, they must be first surrendered in the life-time of the testator to the use of his will.

stranger;

stranger, and died, and the stranger is seised of the rent, and dies: Whether his heir or his executors should have this rent, or not? And BALDWIN, *Chief Justice*, and SHELLEY, said, that no devise lies of a rent, for that it is a new thing, to which the custom runs not. (2) And so said SHELLEY, that he was always of opinion, notwithstanding FITZJ. was contrary, that a rent-charge out of Gavelkind is not departible, but if it be reserved on a lease so as it is incidental to the reversion, peradventure it is departible; and that point he would willingly learn. But as to the last point, whether the executors or the heir should have it, it is clear that the executors shall have it, for their testator never had but a chattel in it.

Dyer, 140. 179. b. 14.
H. 8. 4. & 5. 1. Co.
100. b. 7. E. 3. 38.
F. Avowry 150. 11.
E. 3. Dower 15.
Litt. pl. 585. What is
deviseable. 1. Rol. 1 b.
609. [3. Com. Dig. 1.]
1. And. 191. 224.
Noy. 15. 26. H. 8. 4. 1.
27. H. 8. 9. a. com.
14. H. 8. 7. b. 38. Aff.
28. 4. E. 3. 53. 21.
H. 6. 11. b. 4. E. 3. 32.
b. 3. H. 6. 22. 1.
Per Paston, 19. H. 6.
41. Dyer, 110. b.
49. E. 3. 12. Litt.
168. F. N. 120. 1.
1. Inft. 46. b.

[Robins. on Gavelk. 80. 81. Co. Litt. 111. a. & Mr. Hargrave's note (5) there. 5. Com. Dig. 423. 424. Bac. Ab. Rent (H.) 1. Hen. Bl. 26. note.]

novel rent, it does not follow the nature of the land; and 46. E. 3. 2. a. adjudged, that ancient demesne is a good plea in *† affize for rent*, infra, fol. 8. p. 14. 21. E. 4. 3. a. An use follows the nature of the land, infra, fol. 11. p. 42. *Lord Roos' case*. Litt. p. 314. M. 31. and 32. Eliz. in C. B. in the argument of *† Trevillian's case*, Rot. 2908. ANDERSON cited a case, E. 24. El. C. B. *† Nervey Miller's case v. Stanton, in Kent*: In an avowry, a man pleads a devise to him of a rent out of lands, &c. and by the Court, on demurrer, it was held a void plea, for it was not shewn that the land out of which &c. was socage tenure. 31. H. 6. 15. b. 7. H. 6. 35. b. For *† rent out of ancient demesne lands*, affize does not lie at common law. Fitz. *Ancient Demesne* 41. 9. E. 3. 8. and 13. E. 2. F. *Ancient Demesne* 36. If a man have common in ancient demesne land appurtenant to land which is frank fee, the common is frank fee. So if rent be granted out of land of Gavelkind custom, and of land at common law, and the grantee die, having divers sons, the eldest only shall have all the rent. Adjudged 51. E. fol. 23. pl. 23. 14. H. 8. b.

† In orig. *account*.

† In orig. *ans*.

* (3) A MAN bargains and sells his manor (for twenty pounds to be paid at a certain Feast) by indenture; and in the indenture are divers other covenants, and at the last one for the performance and observance of all and singular covenants and payments specified in the same indenture, and binds himself in forty pounds. Now in an action of debt brought for the forty pounds; Whether defendant can plead payment of the twenty pounds without an acquittance, or not? And it seemed to SPELMAN, FITZHERBERT, and SHELLEY, that he cannot. Yet *quære*, for there are many precedents

* [6. a.]

To debt on an indenture for the payment of a sum of money, payment without an acquittance is no plea.

[Cro. Jac. 377. Cro. Eliz. 455. See 5. Com. Dig. 255.]

B. N. C. 71.
Ho. 49. 1. H. 5. 7.
1. H. 7. 16. b. per
Brian, 7. E. 3. 15. b.
21. E. 4. 42. b. 22. H.
6. 57. b. 22. 1. H. 7.

(3) Dy. fol. 25. b. and 51. a. And it seems that this is like a bond with a condition, for in effect he is bound in the greater to pay the less, and differs from H. 28. H. 8. Inf. 25. b. 48. E. 3. 3. b.

14. b. 28. H. 8. 25. to the contrary, for that very Term, *Rot.* . . . in *Coventry*,
 b. 5. 2. 3. 63. b. Nat. between *Greswold* and *Trye*, the contrary is pleaded.—*Quere.*
 22. E. 4. 25. a. 45. E. 3. 4. Br. Dett 173. It is likely to be a matter of law in the king's bench, &c.
 4. H. 7. 8. 19. E. 4. 2. a. 5. Co. 43. a. 42. E. 3. 13. b. 6. Co. 43. & 44. 33. H. 6. 4. a. 11. H. 7. 4. b. 23. H. 6.
 52. b. Bro. Dett 72.

Clotworthy against Kingsland and Others.

Formedon against three, (4) **A** FORMEDON was brought by one *T. Clot-*
 two confests the action, worthy against three, viz. *Kingsland*, *I. Clotworthy*,
 the third pleads jointe- and *I. Eastchurch*, and *K.* and *I. C.* appear by one attorney,
 nancy with one of them and *Eastchurch* by another. And *K.* and *I. C.* confests the
 only, and traverses the action. *Eastchurch* says, that he held on the day of the writ
 other having any thing purchased jointly with *K.* aforesaid, without this, that *I. C.*
 in the land, this is good had any thing in the land on the day of the writ purchased;
 pleading, and a good if- and as to his moiety of the tenements aforesaid, he vouches a
 sue; and demandant stranger summoned in the county aforesaid, by aid of the
 shall not have judgment Court; and the demandant maintains his writ, viz. that
 against the others till the three were jointenants, as the writ supposes; and this he
 the issue be tried. prays may be enquired of by the country, and the said *East-*
 27. H. 8. 30. S. C. church doth the like. And this was holden good pleading,
 infra, 134. b. 32. H. 6. and a good issue by the Court, and the demandant not to
 14. b. 7. H. 6. 34. a. pray judgment of any part till the issue be tried,
 41. E. 3. 20. b. 5. H. 5. 4. a. That it is ne-
 cessary to plead over. 20. E. 4. 8. a. 12. H. 6. 4. & 5. a. 19. H. 6.
 13. 14. 28. Aff. 25. That he
 has no other replication but to maintain his writ.
 37. H. 6. 16. b. 6. H. 7. 5. b. 9. H. 6. 34. a. 9. E. 4. 36. a. 41. E. 3. 4. 44. E. 3. 23. 46. E. 3.
 15. b. Inst. 260.

Easter Term,

28. Hen. 8.

Lessee by indenture co- (1) **A** LEASE is made by indenture for certain years,
 venants and grants, that and the lessee covenants, and grants to the lessor,
 if he, his executors, that if he, or his executors, or assigns, aliene the term, that
 or assigns, aliene, the

(1) See the case of *Martin Dockwray* in 27. H. 8. 15. there it appears, that there is no
 condition. But *Brooke*, in the Commentaries 139. cites this to be no condition. 9. H. 6. 35.
Waste 39. A man makes a lease without impeachment of waste, with a proviso, that he
 should not destroy houses wilfully, 29. Aff. 23. Partition between parceners and grant of
 rent, and not said to take from any soil.

25. Eliz. & *Lernard's* case. A man leased for years upon condition, that the lessee should
 not assign it over. The lessee acknowledged a statute; the term is extended. *WALTERS*
 cited this, resolved to be a breach of the condition, although they come in in the *post*, and
 by act of law. [But see at the end of *Cryse v. Bugby*, 3. Will. 237.]

then

then it should be lawful for the lessor and his heirs to enter, and oust the termor. The lessee makes his wife his executrix, and dies; the wife takes a husband, and the husband alienes the term; and the lessor, before any entry, makes lease of that land for a term of years, &c. Three points are to be considered in this case: First, If this grant and covenant made on the part of the lessee be a condition that gives advantage to the lessor to enter or not. (2) And it seemed to *MARVYNE and SHELLEY, that it did not: but it is a constant principle, that a condition may not be reserved nor made by any one, unless on the part of the lessor, feoffor, or donor, for the condition is annexed to the thing given or leased: and it is not like a rent or a common, the which the lessee may well grant to the lessor, for it is not a condition that can defeat his estate, &c. And although FITZHERBERT said, that all the grants, covenants, and words in an indenture are the grant and agreement of both parties, and is only one deed (as he had argued), yet the covenants and grants which arise from one party are not the covenants and grants of the other party. And the common pleading in debt on bond, or a sum contained in an indenture, proves this: Defendant shall not be driven to plead performance of more than his own conditions and grants, and shall not meddle with the covenants made by the plaintiff; which is a proof that although it be but one deed, yet the grants and covenants are several. (3) And it in no wise resembles the case which FITZHERBERT hath put, That if an indenture run thus, viz. "*It is witnessed, that it is covenanted, granted, and agreed between the aforesaid parties, that one shall have certain land for years or otherwise, and that he shall not aliene,*" that is a good condition, for those words are spoken in the third person, and suit equally well to the lessor and lessee, so no resemblance. And so MARVYNE said, that it is a book case, that if a man grant an annuity *simpliciter*, and the grantee grant for the same annuity to give him counsel, still if he do not give him counsel, the annuity is not determined by this condition. But FITZHERBERT argued to the contrary. (4) The second point is, Whether the condition be

lessor may enter; then makes his wife executrix and dies; her second husband is assignee in law sufficient to defeat the lease.

But whether the covenant above, on the part of the lessee only, make a condition, *qu.*

And if he aliene, the lessor, without entry, cannot make a new lease.

* [6. b.]

3. Cro. 757. 208. 4.

Mar. 152. a. 10. Aff.

15. 10. E. 3. Aff. 161.

Dyer, 45. a. 56. b.

Owen, 14.

14. H. 6. 29. Pl. 134.

a. 734. a. 27. H. 8.

17. a. Plow. 132. a.

139. 142. a. 27. H. 8.

15. b.

[Dy. 65. b.]

Plow. 133. Dy. 311.

14. a. Litt. 47. 80. b.

a. Co. 70. 1. 1. Inf.

237.

[Cro. Jac. 398. a. Bull.

290. Ow. 151. 1. Leon.

245. a. Com. Dig. 438.

1. Wood's Conv. Tit.

Covenant (F) Sheph.

Touch. 51. 120. Co.

Lit. 203. b. Mr. Hargr.

note (1)]

11. H. 7. 28. b. Plow.

134. a. 21. H. 6. 51. b.

95. H. 6. 33. F. Es-

toppel 57. Post. 13. b.

57. a.

3. Cro. 202. 33. H. 6.

9. 65. 132. apres. 9.

H. 6. 35. a. Dy. 91. b.

15. E. 2. a. 39. H. 6.

9. b. 17. E. 3. 9. F.

Avowry 95. 5. E. 2.

Annuity 44. The book

is against Marvin and

Annuity 27. & 30. 8.

H. 6. 23. Godb. 99.

Vide 9. Co. 10. for the

reason of the case cited,

35. H. 6. proves this

difference, and fol. 79.

15. H. 7. 10. b. 9.

15. E. 4. 20. 3. b. 6.

E. 6. 76. a. Jo. 20.

(4) It was adjudged 25. Eliz. in C. B. Lease on condition, that neither lessee *nor his assigns* should grant. Administrator is *assigner*, and if he grant, the condition is broken. See Plow. 192. The husband shall be in from the demise.

T. 3. Jac. B. R. *Horton and Barton's* case, the opinion of YELVERTON. [Cro. Jac. 74. See also *Roe v. Galliers*, 2. Term Rep. 133. and *Roe v. Harrison*, ib. 425.]

Latch. 20. 31. H. 8. 45. a.
 27. H. 8. 2. a. Executor is assignee in law.
 20. Aff. 5. & 10. E. 3. 41. It seems that a disseisor shall be called an assignee, 29. E. 3. 48. Voucher 3. 12.
 30. E. 3. 14. b. That the husband is voucher, by reason of the grant of the ward of the wife.
 2. E. 3. 15. a. Dy. 45. b. 65. b. 178. pl. 36.
 5. Co. 19. 3. E. 3. 15. a. 5. Co. 17. a. Mo. 11. 3. Cro. 816. 6. Co. 36. a. 1. Rol. Rep. 70. 136. 198. Mo. 21.
 Dy. 13. a. Plow. 191. 118. 47. E. 3. 12. b. 7. H. 6. 12. 1. a. Note, Dr. Ridley 217. Plow. 259. a. Cannot be in this case assignee in deed.
 21. H. 7. 29. b. 21. E. 4. 4. b. Plow. 418. 6. 26. Eliz. 331. a. 26. H. 8. 7. 14. H. 4. 24. b. 5. Co. 36. 43. E. 3. 10. b. Dy. 183.
 * [7. a.]
 264. 4. Co. 80. b. 3. Cro. 26. 9. E. 4. 42. per page & 39. H. 6. 15. b.
 [Doug. 180. 455. 461. note. 3. Term Rep. 393. 402, 403.]
 2. H. 4. 19. b. 37. Aff. 11. 3. H. 8. 2. b. Perk. 560. 33. H. 6. 31. a. 48. E. 3. 12. 13. Co. 122. pl. 74. Fitz. Executor 119. Moor. 358. Owen 56.

broken by the alienation of the second husband, or not? And, by ENGLEFIELDE, this is a doubtful point; and because he had not heard the case before, he would not speak unadvisedly. But BALDWIN, *Chief Justice*, argued, that the condition is not broken, inasmuch as the husband who alienes, cannot be called assignee; because his estate is created by the law, and he comes not to the term by the assignment of any one; any more than a tenant by the curtesy, &c. And so if the case were, that the lease had been made in such manner to a villein, and the lord of the villein enters and alienes, this is not a breach of the condition; for that a condition shall not be taken in a greater latitude than it imports, and the lord is in by his title, by the law, and by assignment from none; wherefore, &c. (5) BROWNE and SHELLEY said, that an assignment or gift in law is as binding as an assignment in deed, for by the marriage, the term vests in the husband in the same manner as a gift from the wife; and so, by reason of the marriage, he hath the term in effect as in right of his wife; so that the wife shall have it, if the husband do not aliene it, and not the executors * of the husband, for it is a chattel real; but of mere chattels personal it is otherwise. And this land is tied with this condition, in whose hands soever it come; wherefore, &c. FITZHERBERT argued, that the sale by the husband is not good, inasmuch as it would be contrary to reason that the sale should be good made by other than by the executor, and the husband is not executor, &c. And there is a difference between a term which a woman has in her own right, and a term which she has as executrix; (6) for in the first case, the husband is possessed of it solely in his own right to

(5) 43. Eliz. Mr. Mason's Rep. and H. 5. Eliz. Mr. Randal's Rep. Lessee covenants, that neither he nor his assigns should cut trees during the years; he died intestate; the administrator cuts trees; and it is a breach of covenant, by the Court; and so E. 20. Eliz. *Elimoore's Case* (a) of alienation by administrator, adjudged upon demurrer: and there MEAD put the very point here in DYER, and held, that it is a breach of the condition. GLANVILLE, on the 26th of February 1629, in his lecture on the statute 21. Jac. of monopolies, put this case: If the *feme sole* have a patent for the sole use of a new trade invented by her, and afterwards take husband, that the husband shall have advantage of it within the statute, for he is assignee in law. M. 2. Eliz. Lease for years to the baron and feme, with proviso, that if possession of the same land should come into other hands than the baron, feme, and their issue, that the lord, upon tender of one hundred pounds, may enter. The baron died, the feme married again, the lord tendered one hundred pounds, and entered. DYER and BROWN, That it is lawful, for it is the act of the feme. WEST, *contra*. For it is the act of the law, and the baron, during the life of the feme, is possessed in right of his wife; otherwise it would be if the feme had been dead.

(a) Probably *Sir William Moore's case*, Cro. Eliz. 26.

† Orig. *enter*.

sell, lose, and forfeit : yet he agreed that she shall have it, if she survive the husband, and not the executors ; but such things as the wife has, as executrix, the husband cannot give or aliene. But the whole Court was contrary, &c. And as to the last point, it seemed to all that the lease is not good, because the land is not adjudged to be in him before entry. Wherefore *quære*, because MARVYNE and BROWNE demurred in judgment.

[Doug. 484. See Mr. Butler's note (3) to Co. Lit. 263. a.]

(7) **I**N a *præcipe quod reddat*, the tenant vouches, and a *summoneas ad warrantizandum* awarded. And the sheriff returns, that the vouchee is dead. Now it was moved, whether the tenant might revouch one at large, as son and heir ; and pray that for his nonage the parol might demur. And it seemed clear to the Court, that if he were not within age, he might well vouch at large, inasmuch as the first vouchee had never entered into the warranty ; but whether he might vouch one within age they would be advised, &c.

7. Aff. 4. 7. H. 4. 15. a. 4. H. 4. 2. a. 50. E. 3. 2. b. 13. H. 7. 25. a.

The vouchee dying before he enters into the warranty, the tenant may revouch at large the son and heir, if he be of full age. *Aliter quære.*

38. E. 3. 27. b. 41. E. 3. 29. and 30. E. 3. 24. 39. 71. 8. H. 7. 6. b. That he may vouch at large, and he may shew cause. Fitz. Voucher 130. 3. 220. 71. Fitz. Voucher 104. 23. [Booth Real Actions 49.]

(8) **A** MAN possessed of a term for forty years makes his will ; and thereby wills, " that *A.* his eldest daughter shall have the term to her and the heirs of her body begotten ; the remainder (if she die without issue within the term) to *C.* his second daughter in tail, &c." and the eldest daughter marries and dies without issue within the term, and after her death the husband sold the term ; the question was, What remedy hath the younger daughter ? And BALDWIN and SHELLEY held, that she hath none, for it is contrary to law that a term may be limited in remainder any more than other chattel personal, as a cup, or other chattel ; as a remainder of books in 34. or 35. H. 6. [37. H. 6. 30.] is void. So it appeared to them that the sale by the husband is good enough and indefeasible. (9) **E**N-

A remainder of a term for years cannot be limited over after an estate tail.

8. Co. 95. a. Dy. 74. a. Plow. 18. 59. 4. 8. Co. 66. b. 91. a. 10. Co. 53. a. 87. Plow. 520. a. 6. E. 6. 74. b. 4. Mar. 140. a. 10. Eliz. 277. b. 19. Eliz. 358. b. 359. Dier, 253. b. 1. Bullst. 191. 2. Cro. Jac. 461. Moor. 758. Went. 334. 10. Co. 47. Palm. 334. Plow. 542. b. 521. b. 516. B. N. C. 209. 334. 338. 437. Bro. Chateaux 23. Done 57.

GLEFIELD

(8), (9) *I. S.* having by lease for many years divers messuages in *D.* and *S.* devises all his leases to *A.* his cousin, saving the leases of the messuages in *S.* which he wills the children of his cousin *A.* to have after the death of the said *A.* ; and besides makes *A.* his executor, who enters generally, and afterwards, for consideration of money, sells all the messuages

Post. 140. b.

GLEFIELD thought that it might remain, for that it is by will, and the intention of the maker shall be construed; and that was no more, than if it should happen that the eldest daughter die without issue within the term, that the second daughter should have it; and he thought it might remain immediately after her death, and that the second daughter might enter, &c. BALDWIN. This is not like your case; for I readily agree, that if a man devise his term to one upon such condition, that if he die within the term a stranger should have it, in that case he does not give all his * term and interest to him, but so much of the term as runs during his life, and the residue the stranger shall have: but in our case he devises all the term entire to his eldest daughter; wherefore it does not resemble, &c. And he said, that he had moved this very question when he was serjeant, and the Court were of his present opinion, &c. (a)

Plow. 525.

* [7. b.]

messuages demised. And it was holden as a rule, by many skilled in the law, that there is no remedy in chancery against a purchaser who comes in for valuable consideration; and so it was ruled in the exchequer chamber, in the case of *Cole of Winechester against Sir Daniel Norton*, who had purchased the tithes of *Hilse* for less money than they were worth. And there is clearly no remedy in law against the executor. *Quære*, If in equity? — But it resembles a petition between a father executor and an infant. And they held this case of a term to be like a case of land of inheritance, which is devised to the son after the death of the wife; for there, by implication, the wife has an estate for life.

(a) How far a devise of personal property, limited over to take effect after the death of the first devisee, was good, was the subject of much litigation formerly, and a distinction has been drawn which runs through all the old cases upon this subject, namely, That where the use of personal property is left to one, with remainder over upon his death to another, the remainder over shall be good; but where the chattel itself is given to one for life, remainder over to another, in that case the remainder over is bad; as by the gift of a chattel for a moment, the entire property is passed for ever: but a more liberal construction has long prevailed, and the Courts have considered the use only as passing under such general devises, so as best to give effect to the intentions of testators. Wherefore limitations of personal estate have been frequently held to be good; as in *Hyde v. Parratt and Another*, 1. Peere Williams 1. Still however the case in DYER, as it stands, is law, and a devise in tail with

a remainder over of a chattel real, is held bad, both as to the remainder over, and further as to the intail, and the complete property is vested in the first devisee, and his executors, so that he may dispose of it as he pleases; which if he do not, his executors, and not his issue, shall have it. "However, terms for years and personal chattels may be so settled as to answer the purposes of an entail, for they may be entailed by executory devise, or by deed of trust, as far as the duration of lives *in esse*, and 21 years after." See Mr. Hargrave's note, Co. Litt. 20. a. b. last edit. and the cases there cited. See also *Tyssen v. Tyssen*, 1. P. W. 500. *Upwell v. Halfey*, 1. P. W. 651. *Foley v. Burnel*, 1. Br. Chan. Cases 274. *Fearne's Contingent Remainders and Executory Devises*, 3d. edit. P. 304. 320. 342. 372. & seq. 1. Term Rep. 593. 2. Term Rep. 720. 1. Br. Chan. Cal. 179. 187. 2. Br. Chan. Cal. 553. 570.

(16) **MOUNTAGUE** asked, if a man shall have execution of the profits of an office of Filazer upon a statute, inasmuch as he shall have an affize of it as of a freehold. And **SHELLEY** said, That he should not, for a man can never have a thing extended on an execution, unless he may grant and assign it; and the office of Filazer cannot be granted, inasmuch as he is an officer of the court, and does the business of the court, and not his own business; and it is an office of trust, which cannot be assigned, as the office of carver at my table cannot be assigned; wherefore, &c.

The profits of the office of *Filazer* cannot be taken in execution upon a statute.

7. E. 4. 29. b. F. Vou-
cher 116. 8. Co. 47. b.
2. Inst. 412. 41. 2. H.
6. 11. That a wife shall
be endowed of a villein
in gross, and so it seems
he shall be put in exe-
cution.

Dy. 114. b. 2. a. Vaugh.
81. 181. Plow. 339.
b. Perk. 99. 101.

[Jones 121. Hen. Black.
248. Caf. in Chan. 39.]

322. 627. 3. Term Rep. 681.

4. Term Rep. 248.

(10) 21. E. 3. 4. and 16. Fitz. *sci. fa.* 111. where an *elegit* was sued upon damages recovered on trespass, and it seemed, he ought only to take such things as accrue by the law as a garden, and not to cut the trees.

Trinity Term,

28. Hen. 8. since the Conquest.

The Abbot of Bury *against* Bokenham.

(11) **THE Abbot of Bury** brought a WRIT OF WARD against *Elizabeth Bokenham* of a plea, that she render up to him *John Bokenham*, son and heir of *T. B.* the custody of whom belongeth to him the said abbot, for that the aforesaid *T.* held his lands of the aforesaid abbot, by knight's service, &c. and declared that *Tey, Knight*, and others, were seised of the manor of *Brimbhall, &c.* in their demesne, as of fee, to the use of the said *T. B.* and his heirs; and being so seised, held the said manor of the abbot by the services of two parts of a knight's fee, of which services, &c. (12) And the said *Tey* and others so being seised, *inter alia* enfeoffed *J. Jennor* and others in fee to the use of the said *T. B.* and the aforesaid *Elizabeth*, then his wife, for the term of the life of her *Eliz.* and after the death of the said *Eliz.* to the use of the said *T. B.* and his heirs: and the said *Jennor* and others, so being seised of the said use, the aforesaid *T. B.* died, the aforesaid *J. B.* the son and

The heir of *cessuy que use* in fee, where the feoffees to the use had made an alteration of the first use by the addition of a particular life, shall not be in ward, living the particular tenant (b).

Hil. ult. rot. 420. but no judgment given there.

1. Anderl. 2. } S. C.
[Bendl. 16.] }

4. Mar. 134. 2. 2. Co.
91. b. Co. Litt. 13. 2.
3. Leon. 25. Hob.
280.

(b) Wardship with the rest of the feudal services was abolished by 12. Car. 2. c. 24.

heir of the said *T.* being within the age of twenty-one years, by reason whereof the custody of the said *J. B.* belongs to the said abbot; and the aforesaid *E.* the said abbot unjustly deforceth thereof, &c. To this count the tenant demurred in law.—*MARVYNE.* The writ supposeth that *Bokenham* holds of him by knight's service, and the count is not supported by that; because he counteth, that *Bokenham* is only seised of an use, and that the feoffees were tenants, and for that the count * is not warranted by the writ. (13) And as to the matter in law, viz. Whether the son of *Bokenham* shall be in ward or not, it seems that he shall be out of ward. For the statute 4. *Hen. 7.* [c. 17.] which gives, that the heir of him to whom the use belongs shall be in ward, as if his father had died seised in his demesne, proves that the use shall make the heir liable to wardship, in the same manner as if the possession had been in *Bokenham*: if then it be so, the case would have been clear, that if the feoffees had executed the estate in possession to *Bokenham* and his wife for the term of the life of the wife, and to the heirs of *Bokenham*, that in that case, inasmuch as the lord hath his tenant upon whom his avowry rests, viz. the wife, the heir of the husband shall not be in ward. And this the common case proves, viz. If the tenant make a lease for life, remainder in fee to a stranger, if he in remainder die living the particular tenant, his heir within age shall be out of ward. (14) So it is if a woman tenant take husband, and have issue within age, and die, the husband being tenant by the curtesy, and tenant to the avowry of the lord, the issue shall be out of ward: and so the feoffees have authority to sell the land to one who has not notice of the use, and that divests the use from the feoffor. And for the like reason that the feoffees may sell the land, and alter the possession of it, for the same reason they may limit the use to whom they please: as in assize of rent, ancient demesne of land is a good plea, for that they have authority to hold plea of the land out of which the rent is issuant, and *à fortiori* of the rent; wherefore, &c. And so, for another reason, admit that the feoffees have not such authority to alter the use without the assent of the feoffor, yet inasmuch as they have intermeddled with the land and the use, they have gained thereby a new use, and have given and limited it to *Bokenham* and his wife; and that is not the ancient use and fee-simple, but a new use.

Post. 291.
Post. 83. b.

[* 8. a.]

Post. 130. a.

Post. 54. b.
Moor. 177.
9. E. 4. 18.

Dier, 237. a. b. Fit.
Gard. 8. 23. 28. E. 3.
93. 11. H. 7. 19. a.
15. E. 4. 12. a. F.
Gard. 18. 142. Br.
Gard. 100. 1. Co. 92.
10. Co. 81. a. Br.
Gard. 93. 9. Co. 126.
Litt. § 114.

Lit. 25. a. Tenant by
the curtesy is tenant to
the avowry. Fit. Qua.
Imp. 159. Ibid. 71.
F. N. B. 143. 14.
H. 6. 25. Dyer, 140.

14. H. 8. 5. 8. 46.
E. 3. 1. b. 22. Aff.
78. 1. Co. 22. Dy.
15. b. F. Ancient De-
mesne, 41. 4. E. 3.
90. 9. E. 3. 8. 40.
E. 3. 4. b. 4. E. 3.
32. b. 53. a. 2. H. 7.
17. b. 21. E. 4. 3. a.

(15) As if tenant in tail make a lease for his own life, remainder to the donor in fee, that gift of the fee is void, inasmuch as he had the fee before; but if he make a lease for term of *auter vie*, remainder to the donor, that vests a new fee in him, for that by the discontinuance he divests the ancient fee simple out of him, and gives him a new one; so it is of tenant for term of life, &c. Wherefore, for all these causes, the heir of *Bokenham* shall be out of ward.—

KNIGHTLEY, *contra*. And as to the exception to the count, it is of no consequence, for in many cases a man shall have a general writ, and a special count. (16) As if a man shall have *warrantia chartæ*, supposing by the writ *unde chartam habet*; and he counteth on a warranty for homage auncestrel; so here the statute gives the wardship of the heir of him who hath the use, but does not thereby give any special writ, but that writ which was before. As is the statute made in the time of *Hen. 7.* [11. H. 6. c. 5.] that if tenant for life or years * grant over his estate to his use, the action of waste will lie against him, supposing that he holds for term of life or years, because no writ of other form is given upon the case by the statute, no more in this case. (17) And as to the matter, if a man look to the statute 4. H. 7. [c. 17.] it depends upon two branches: the one is, if no will be declared, he shall be in ward: the other is, that he shall be in ward, as if the father had died seised. FIRST, It seems, that the first branch here is not observed, for it appears that no will is declared, nor any request made by *cessuy que use* to the feoffees to make any feoffment to others for his use, and the use of his wife, nor any consideration to alter the ancient use; but if it had been at the request of *Bokenham*, it would have enforced the matter. But here the feoffees have made a feoffment, and limited the use of their own heads, without the desire of *cessuy que use*; which they could not do, as it seems, as the case is here.

(18) And yet in some cases I will readily grant, that the feoffees to an use of their own authority may divest and alter the use of their feoffor; and that is in three cases, *viz.* by reason of person, by reason of estate, and by reason of a feoffment made to one for a certain sum of money *bonâ fide*, and who hath not notice of the former use. The first is, if the feoffees enfeoff the king, he hath such prerogative of person that he cannot be enfeoffed to an use. So it is of a feoffment

Flow. 560. a. Litt. § 625. It was adjudged in Sir William Aston's case, that it was a discontinuance. See 139. b. 9. E. 4. 24. b.

[4. R. M. 2418. 3. Wilf. 61. 141. a. Black. 722.]
Fit. 134. 7. H. 7. a. Litt. 14. F. N. B. 60. d. Dy. 83. b. 30. E. 3. 13. b. Fulh. 60. d. 38. H. 6. 11. a.

[* 8. b.]

Rastal, Waste 9.
Fit. Nat. Br. 59. E.

17. H. 2. 8. b.

[Gillb. Law of Uses, 180.]

Flow. 238. b.
Flow. 23. b. 351. a.
Mo. 374. a. Cro. 150.
5. 7. E. 4. 7. 17.
Flow. 242. b. Coke, 121. b. Dyer, 155. a. 283. b. 146. 7. Bro. Feoffment ad Uses 10. 40. B. N. C. 60. 284. Litt. § 296. a. Inf. 19. b.

feoffment made to an abbot and convent, they have not capacity to take for the use of another, but solely for their own use. The second is, by reason of estate; as if the feoffees make a lease for life on an estate tail: in these cases, if they be argued closely, the law will prove that the lessee or donee cannot be seised to an use. The third, by reason of feoffment made for money *bonâ fide* to one who hath not notice of the use; but if he hath notice of the use, although he hath given money, that shall not change the use.

(19) Here then the case is otherwise, for the feoffees newly enfeoffed are such persons as may well be seised of an use; and so they have no particular estate as before, but an estate in fee, by which it seems they have not power to limit the use at their pleasure; for it seems that if the feoffees, without the request of *cestuy que use*, will enfeoff another to the use of a stranger, that shall not change the use, but it always rests in the feoffor as before. (20) And for the same reason here, inasmuch as they have limited an use to the wife of *Bokenham*, that is nothing to him: although husband and wife in some respects are as one and the same person in law, yet in this respect, *viz.* to become the purchaser of an use, she is as a stranger shall be. Here then the limitation of the fee-simple of the use to *Bokenham* was void, for that he had it before, and it was never divested from his person; and then it follows, that for the ancient fee-simple of the use his heir shall be in ward: as if a man make a gift in tail or for life, remainder * to the right heirs of the donor, Will this make his heir, if he be within age after his death, to be out of ward? (*as if he should say, No*) inasmuch as the expression of fee-simple (for that it was never out of his person) is to no purpose. (21) And he denied the case of *Marvyne, scil.* Where tenant in tail makes a lease for term of *auter vie*, remainder to the donor in fee-simple, that this should be a novel fee-simple in the donor; he thought it should not, inasmuch as he took a fee and lost a fee by one and the same livery at one and the same instant, which could not be (*Quare inde*). But admit that the law should be so, and that it is a novel fee-simple of the use (which he thought cannot be), yet it seemed to him that the law is, that he shall be in ward (*as at present advised*). (22) And yet he agreed to the common case, that if a lease be made for term of life, remainder over in fee, if he in remainder

27. H. 8. 10. a. Plow.
555. a. 538. b. Dyer,
10. 14. Eliz. 312. a.
Perk. 534. 5. B. N.
C. 156.

1. Co. Chudlie's Case,
14. H. 8. 9. a. Crook,
42. 93. a. Dyer, 340.
b. 7. E. 4. 7. 8.
Plow. 351. a.

* [9. a.]

a. Co. 91. b. Dy.
54. b. 139. a. B.N.C.
186. Dy. 150. 156. a.
172. b. 237. b. 199. a.
326. a. Br. Gard. 93.
& Livery 61. 1. H. 5.
8. b. 4. H. 6. 22.
Bro. Tenures, 21. 18.
E. 3. 36. b. 1. Inst.
22. b. 163. a.

Vid. 1. Inst. 335. a.

mainder die his issue within age, he shall not be in ward, for that he in remainder is not tenant to the lord until the remainder fall in. But if a feoffment be made to husband and wife for the term of the wife's life, and to the heirs of the husband, and the husband die, it seems that his heir shall be in ward for the fee-simple, for that the fee vests in him immediately, and does not go by way of remainder; and yet he agreed, that for the advantage of the wife the fee is not knit to the freehold, but that it shall survive to the wife. (23) And he also agreed, that if a recovery be had against them by default, there are Books which say that the husband shall have a *quod ei deforceat* of all; and the reason there is, for that between husband and wife there are no moieties. But let us put the case of two other persons, that land is given to two, and to the heirs of one, in that case all the fee is not merely executed and knit for the advantage of the survivor, having regard to him, for he shall not be punished for waste; yet with regard to all strangers it is executed, and then also the heir shall be in ward for the fee-simple: and to prove that it is in him, the law is, that if recovery be had against them by default, one shall have a *quod ei deforceat*, and the other (namely, he who hath the fee) a writ of right: so it seemed to him, that if the estate in possession had been to *Bokenham* and his wife, *ut supra*, the heir should be in ward. But the case is more clear, as he thought; wherefore for all these causes he thought the Abbot of *Bury* should recover the ward, &c.

(24) And in *H. 28.* of the now king, the case was again argued as follows: *MARVYN* thought that the heir should be out of ward, and founded his argument upon the statute of 4. *Hen. 7.* [c. 17.] which says, that the heir of *cestuy que use* shall be in ward, as well as if he had died seised of the land in demesne; then it is to be considered, what will be the law if the lease had been made to the husband and his wife for the term of the wife's life, remainder to the right heirs of the husband, and the husband died his heirs being within age, he should not be in ward; and so it is adjudged in 28. *Edw. 3.* [27. *Edw. 3.* 4. a. pl. 4.] in a writ of right of ward, inasmuch as the wife is tenant to the lord. The same is the law of a lease made for * term of life, remainder over in fee; if he in remainder die, his heir, being within age, shall not be in ward during the life of tenant for term of life, because the avowry

F. N. B. 142. b. 143. a.
F. Gard. 8. 6. Co. 3. a.
11. H. 7. 19. a. 15.
E. 4. 11. b. Dy. 137. b.
10. a. 28. 30. E. 3.
93. a. 5. B. N. C. 522.
2. Co. 61. 6. Co. 79. a.
1. Co. Archer's Case
1. Inst. 22. b.

[2. Lev. 39. 2. Vern.
120. 2. Black. 1211.]

9. E. 4. 37. a. 6. H. 4.
4. b. Dy. 341. a.
Plow. 58. F. N. B.
156. a. 4. E. 3. 39. a.
42. E. 3. 9. 27. H. 2.
12. 11. H. 4. 54. F.
Sci. Fa. 19. 50. E. 3.
3. b.

43. E. 3. 3. a. b.

3. E. 4. 10. a. 19. 34.
H. 6. 45. 31. b. 46.
E. 3. 21. b. 18. Plow.
419. b. 5. Co. 40. b.
2. E. 4. 10.

8. E. 4. 20. a. 43. E. 3.
29. 28. E. 3. 93. 27.
E. 3. 80. Fit. Gard. 23.
24. E. 3. 51. 44. E. 3.
36. a. See the stat.
32. Hen. 8. c. 1. which
hath altered the law in
the case of the king.
Co. Lit. 22. b.

* [9. b.]

[Gilb. Law of Uses, 371. See Co. Lit. 29. a. and Mr. Hargrave's note (6). Vin. Ab. tit. Curtesy (E).]

33. H. 6. 55. b. Perk. § 457. Shall be in ward by the stat. 4. H. 7. before 3.

27. Hen. 7. 19. a. 7. H. 6. 3. b. 1. Co. 132.

14. H. 8. 8. b. Dy. 340. b. 14. H. 8. 5. 6. Cro. 41. b. Lit. 464. 13. Hen. 7. 7. b. Cro. 33. b. 42. a. 46. b. Plow. 58. a. 5. E. 4. 7. a.

1. Co. 122. 2. Co. 94. 1. Anderf. 2. 3. F. Collusion 29. 3. Co. 98.

1. Co. 139. b.

1. Keb. 2. 1. Inf. 146. a.

rests upon him. (25) And it seemed to him, if a man be seised of land in right of his wife in use, and hath issue by the wife, and the wife die, the husband shall not be tenant by the curtesy of the use; and yet by the aforesaid statute the heir shall be out of ward of body and lands, because the statute says, that the heir shall be in ward, as if the ancestor had died seised of demesne; and if it had been so, the heir during the life of his father shall be in no ward (*quare*): but it may be said colourably, that here the fee-simple of the use, which was before the feoffment, remains in the same manner and form as it was before; wherefore then the heir shall be in ward. As if the tenant had made a lease for term of life, and died, his heir shall be in ward, for that the fee-simple is holden there. (26) But it seemed to him, that the ancient fee-simple of the use is not in the husband, because a stranger took the use jointly with him; for by the rule of common law, feoffee of an use has authority to sell and depart with the land at his pleasure, and is very tenant to the lord, and upon attainder shall forfeit the land; and *cestuy que use* cannot take cattle *damage feasant* in his own name (although he shall be sworn upon inquests), because he hath no interest in the land, as adjudged 15. Hen. 7. [13. pl. 1.] by which it seems, that if the feoffees sell the land to one who hath not notice of the first use, he shall be seised to his own use; and the case is adjudged in 21. Hen. 6. of a cardinal, that if the feoffees to an use make a feoffment *bonâ fide*, that alters the first use. (27) And so the power of him who is tenant of the land is great in law; for the case is adjudged in 33. Hen. 6. [14. b. pl. 6.] if the tenant make a feoffment by covin to defraud the lord of his ward, if the feoffee make a feoffment over, the covin is gone: so for all these causes the heir shall be out of ward. KNIGHTLEY *è contra*. And he said, that the statute aforesaid is to be intended in two branches; one is, that no will is declared; the other, that the heir shall be in ward, as if the father had died seised of the demesne: the first point here fails to toll the lord of the ward, and so here appears not any consideration, nor a request made by *cestuy que use*; wherefore the feoffees of their own head and fantasy shall not alter the use of their feoffor. (28) For a man may have the inheritance as well in the use as in the land; and although a man cannot have an action at law to demand the use.

use if he be disturbed in it, yet that does not prove but a man may have an inheritance in it: as if I grant to one a rent out of my land, proviso that he shall not charge my person, he has presently a fee-simple in the rent; and yet if he were never seised of the rent, he hath no remedy by action. But he would well agree, that in some cases the feoffee may devest the use without the will of the feoffor; but those are cases in which *inconveniences will ensue, if they ought not to change the use. (29) As if they make a feoffment, and take money for the land, there the use is altered, inasmuch as otherwise the feoffee would be distrained, and would not have *quid pro quo*. The same is the law between lord and tenant; the tenant may prejudice the lord by his feoffment; or otherwise an inconvenience might ensue: as if he enfeoff the king, the seignory is gone, for that the king can hold of no one. So also is the law, if the tenant enfeoff the lord paramount; the mesnalty is extinguished for the reason that a man cannot hold of an inferior lord, but always of a superior. (30) So the law is, if feoffee to an use make a lease for life, or in tail, or for years, without reserving an express use, the particular tenants hold it to their own use, and not to the first use, for that the law raises the consideration. But here the case is, that they have made a feoffment in fee without any consideration, by which the first use is not altered. (31) And he said, he thought that the law is, that if the feoffee make a feoffment to another with warranty in deed, or by *dedi*, the which case implies a recompence, still that shall not alter the use; or if the feoffment were by deed indented rendering rent, he thought that this shall not alter the use, for this rent doth not make any consideration, for it is rent which issueth out of the land, of which rent the feoffee shall be seised to the use of the first feoffor, &c. (*Quere inde.*) (32) And besides he thought, for another reason, that the heir should be in ward; for it is impossible to give to the husband a novel use where the ancient use always continueth in his person, for the common case proves this. If tenant in tail enfeoff the donor, that is no discontinuance, because he had the fee before: and so the husband and wife are one person in law, and the wife cannot take for her husband in the same thing which rests with the husband. (33) As if a man have right and good title to enter into land, and the tenant enfeoffs the husband

6. Co. Bredimon's Case
cont. H. 4. 5. a. 8.
E. 3. 51. a.

* [10. a.]

3. H. 6. 24. b. 47.
E. 3. 13. a. F. N. B.
142. P.
[5. Com. Dig. 472.]

45. E. 3. 6. b. 38.
H. 6. 6. a. Stamford.
Prerog. 75. Dy. 154. b.
146. b. Litt. 50. b.
7. Aff. 2. Litt. 231. a.
Mo. 237. Litt. § 231.
14. H. 8. 8. a. 10.
Plow. 555. 2. Co. 72.
Perk. 537. 27. H. 8.
10. a. 1. Co. 24. a.

[1. Co. 127. Doug.
773, 774, 775.]

1. Co. 2. b. 5. Co.
18. a. 10. Co. 34. a.
Mod. Rep. 263.

[Gillb. Law of Uses,
173, 174. 2. Will. 19.]

9. E. 4. 24. b. 14.
H. 8. 2. b. Litt. 140. a.
Plow. 559. Litt. 625.
Dy. 10. b. 68. a. 9.
12. b.

39. E. 3. 29. 17. E. 3.
26. a. Dyer, 134. a.

4. El. 177. b.

Ante, 9. a. 1. Inf.
182. b. 184. a.

* [10. b.]

46. E. 3. 21. 19. 34.
H. 6. 45. b. 31. b.
3. E. 4. 10. a. See
Fulb. c. 6. fol. 46, 47,
48. 26. Aff. 38. 9.
E. 4. 18. a. Cro.
127. b. 9. Co. 107. b.
10. E. 4. 4. a. 5. H. 5.
8. b. 21. H. 6. 33. b.
Co. 78, 79. That a
moiety cannot be be-
tween husband and wife.
See 9. E. 4. 37. b. 40.
E. 3. 46. b. Plow. 58.
40. Aff. 7. F. Remitter
12. Cui in Vita, 20.
35. Aff. 15. B. N. C.
175. 12. H. 4. 1.
Dy. 68. a. Plow. 198.
42. E. 3. 10. b. 33.
Aff. 4. 1. Co. 62.
Plow. 160. a. 3. Mar.
326. b. Perk. 36. b.

1. a. Co. 34. b. 68.
Litt. 66. 298. 1. Inf.
183. b. Hob. 172.
Fof. 126. b. 36.

and wife, there the wife takes nothing. And this case here is not like the case put before, that is to say, where land is given to two, and to the heirs of one, he who hath the fee dies his heir being within age, it hath been said, and so it is commonly taken for law, that the heir shall be out of ward. But it seems to me (as at present advised) that he shall be in ward in that case; although, were that the law, the case here much varies. (34) And the reason in the other case would be, in my opinion, that although he who hath the fee-simple between him and his companion hath only an estate for life, and the fee in consideration of law, yet with regard to the lord and to a stranger he hath the fee-simple executed; and this the case of a recovery by default proves, the one shall have a *quod ei deforceat*, and the other a writ of right; and it is not impertinent, since a man may be tenant in fee-simple * as to one, and tenant for life as to the other, in respect of their different interests. (35) As if tenant for life grant a rent-charge, and he in reversion grant another rent-charge, tenant for life surrenders, the reversioner shall hold the land charged with two rents; and to the one he shall be tenant in fee-simple, and as to the other only tenant for life. And for another reason he thought that he shall be in ward, for that in this case the husband always had a moiety of the use executed in him; and it seems in this case here, that the law shall make several moieties between the husband and wife, for moieties may be made between them by the act of parties. (36) For if the *habendum* be one moiety to one, and the other moiety to the other, they shall be tenants in common: so the law will make them here, for the use was expressed to the husband and wife for the term of the life of the wife, and after her decease to the husband and his heirs: first the husband and wife were joint-tenants of the use; as if land be leased to two for the life of one of them, it is a clear joint estate, although the survivor shall not succeed. (37) But be the case so that land is given to two, *habendum* to one for his life, and to the other for his life, it seems now that the *habendum* would make them tenants in common. So it is if a lease be made to two for the term of the life of

(36) This case was denied to be law in 41. Eliz. in the reading of *Thurby* by Harris Benchet, and *Flemming* Solicitor, because the limitation is contrary to law, for by law there are not moieties between husband and wife; and the Reader put this case upon the opinion in *Nicol's* Case. Plow, 483. [and 58. *sub fine*. 2. Lev. 39. 2. Vern. 120. 2. Blackitt. Rep. 1211.]

one, remainder to the other, now they are tenants in common, for that *in omni majori concluditur minor* : as if a lease be made to one for term of *auter vie* without impeachment of waste, remainder to him for his own life, now he is punishable for waste, for the first estate is gone and merged : so it is of a confirmation, &c. And for all these reasons he thought the heir should be in ward. (38) BROWNE *à contra*. And all the purport of his argument was, that he shall be out of ward, inasmuch as the lord hath a tenant in the wife upon whom the avowry shall be made ; if she be in possession of the land, he shall not have the ward : for it is common doctrine, that where the lord is served of his tenant, he shall not have escheat nor ward : so if the infant make a feoffment in fee, and die without heir, the land shall not escheat, for he hath a tenant by title ; wherefore, &c. (39) And so he thought the darrein use is a novel use ; for the ancient use was descendible to the heir of *Bokenham* immediately after his death, but here it is not so, for the wife hath an interest to have it after the death of her husband by the survivor ; wherefore, &c.—WILLOUGHBY *to the contrary*. And he looked to the statute 4. Hen. 7. and although the statute says that the lord shall have the wardship of *cestuy que use* where no will is declared, yet in special case he shall make a will, and yet the heir shall be in ward ; (40) as if he devise the use to one for life, his heir shall be in ward for the body, for that the reversion of the use is yet holden of the lord by the statute, for the use shall ensue the nature of the land. So if *cestuy que use* have issue a son and a daughter by the same *venter*, and a son by another *venter*, and die, the eldest son * takes the profits, and dies without issue. the use shall descend to the daughter, as sister and heir to him, and not to the younger son : and this is holden in 5. Edw. 4. [7. b. pl. 17.]. So in the 14th of this king [4. b. pl. 5.] it is holden, if the feoffees grant a rent-charge, the grantees shall be seised to the use of *cestuy que use*, &c. (41) And in effect the case here is no other but that the feoffee to an use makes a lease to one for life, the which is to his own use ; now if the feoffor die his heir being within age, he shall be in ward, as it seemed to him, inasmuch as the reversion of the use rests always in the feoffor, for which reversion he shall be in ward. So the case is here, that the fee-simple of the use continues in the same plight, condition, and form in

Bokenham

8. E. 3. 59. a. F.
Feoffments et Fats, 13.
2. Co. 60.

Co. 11. 83. b. 3. E. 3.
44. 45. 19. H. 6. 23. a.
5. H. 5. 9. a. Co. 5.
13. a. 8. 76. b. 1.
Bulst. 136.

39. H. 6. 42. b. 49.
E. 3. 13. a. 6. H. 4.
4. b. 7. H. 5. 9. b.
Co. 4. 125. a. 8. 42. b.
44. 39. E. 3. 29. 49.
Aff. 4. 32. H. 6. 277.
Co. 7. b. F. Entire
Congeable, 28.

1. Inst. 268. Plow.
53. Dy. 174. b.

[1. Co. 127. 2. Wilk.
19. 1. Wilk. 2. 66.
2. Str. 1179.]

* [11. a.]

Dy. 274. b. 7.

Bokenham at the time of his death, as it was before the feoffment: and also he said, that there was a like case in the same place argued and ruled in the time of this king. —(42) * LORD ROOS brought a writ of right of ward against *M. constable*, where defendant pleaded that the ancestor of the infant (by protestation) did not hold by knight's service of the plaintiff, but for plea said, that the ancestor of the infant held certain land by knight's service of *Lord Dacres* by priority, and that he enfeoffed at the same time divers persons to his use, as well of the land which the plaintiff supposes to be holden of him, as of the land holden of *Lord Dacres*; wherefore the defendant, by reason of the priority, seized the wardship of the body, as servant to *Lord Dacres*, and by his command; judgment, &c. And upon this there was a demurrer, and it was argued, Whether the lord who first got the body should have the ward, by reason of the equal antiquity of the tenure, because the feoffment was made at the same instant? And it was well debated, and ruled that the priority should hold place, and should be preferred, as well of an use as it ought to have been of land, &c. (And FITZHERBERT remembered this as WILLOUGHBY said, &c.) Wherefore for these reasons he thought that the heir should be in ward, &c.—(43) SHELLEY, *Justice*. It seems to me that the heir shall be out of ward. FIRST, the special and chief reason that I have heard why the lord shall have the ward of his tenant if he die his heir within age, is, inasmuch as escuage is a service necessary for the defence of the whole realm, and is, that he shall be with his lord in war out of the kingdom for forty days if it be by an entire knight fee, if by the moiety for twenty days, &c. But when the tenant is in such a situation that he cannot himself do this service, nor find any other that can for him, the lord shall have the ward of the body and land until the full age of the heir, because his covenant made to another to do this service for him shall not bind him, &c. But if the lord be in a situation to have a tenant in life who is able, or who can find another for him, then it is unreasonable for him to have a recompence, viz. the ward. (45) So if the land be given to an husband and wife, and to the heirs of the husband, the husband dies his heir within age, it is very clear from many Books, that the heir * shall not be in ward: and I believe that no man will deny

Hob. 280. 27.

Moor. 285.

Dyer, 174. b. 1. Co.
302. b.

13. H. 7. 6. a. Hob.
27. 2. Rol. Ab. 36, 7.
F. N. B. 33. 18. 142.
F. 92. And this is
proved by West. 2.

Litt. § 203. 35. H. 6.
52. a.

9. Co. 126. b.

Ant. 9

* [11. b.]

deny this; and the reason is, because the wife has the tenancy by the survivor, and she is tenant to the lord as to the avowry, who may find one for her to do the services. And here it is necessary perforce to agree, that the feoffee to an use has a general authority given to him at the first, to do with the land according to his pleasure, viz. to forfeit, to charge, to lose it by false pleading, or otherwise to change the use, and trust as much as he pleases; and no remedy for the feoffor. (46) And no one will deny but a *cestuy que use* may extinguish the use by disseisin or release, and by the same reason alter and limit the use at his pleasure to whomsoever he pleaseth. And although that the feoffees in the principal case had no special authority or request from the *cestuy que use* when they made the feoffment, yet doth not that signify; for by the first feoffment made to them, they have a general authority to change the use at their pleasure, and in every general is included a special. And in a common case, one may divest my estate by a general authority, by the commission of a tort. (47) As if my tenant for life make a feoffment in fee, by this feoffment the reversion is snatched out of me, and that by a tort done, *à multo fortiori* the feoffee could here do what makes no tort. And so although *Bokenham* made no request for the making of this feoffment, yet they the feoffees have done no more than they ought to do, for a man ought to provide his wife a jointure of his land where she is excluded of her dower, by the law of honesty. (48) And besides, if the lord shall have the ward, that ought to be by reason of the statute, which says, that the heir of *cestuy que use* shall be in ward, as if the ancestor himself had been in possession, &c. So that the use is made by this statute to ensue the possession. The which then (as I said at first) makes the case clear, that the heir shall be out of ward. And so, for another cause in my own mind, the law is very clear that the *Abbot of Bury* shall not recover the ward upon this count. (49) First, it is to be considered, what authority we being Judges here have to hold plea. The patent of the king gives us power, &c. but that is not sufficient; for if a man will by parol come into the court here, and complain of his grievance, clearly we can award nothing upon that, but it is fit he should go into chancery, and purchase an original returnable here; and when the patent and original are both here, still it is necessary

31. H. 8. c. 2.

37. H. 8. 29. b. 14
H. 8. 7. a.

Old Tenures, 2.

Dr. & Stud. 98. b.
Perk. 69.

[* 12. a.]

8. Co. 93. a.

fary that the plaintiff shew his tale and title to the Court here by declaration: and when he has even shewn and disclosed his title and grievance to the Court, it is not the office of the Court to say to the party, "Sir, we have knowledge of a better title for you than you have shewn." (50) As if in formedon the * demandant counts of a feoffment in fee, and not in tail, if the tenant demur upon that, clearly the Court cannot maintain this declaration to be good, because *nostrum est judicare secundum allegata et probata*. Wherefore in the case here the Abbot hath counted, that "Tey and others enfeoffed Jenour and others in fee to the use of Bokenham and of his wife for the term of her life, and after the decease of the wife to the use of Bokenham and his heirs; and the said Jenour and others, so being seised thereof to the use aforesaid, &c." So that it clearly appears that the Abbot would demand the ward by force of that use of which Jenour and the others were seised, which is the second use, and not the first use: then it is not our business to say to the Abbot, that his right to have the ward is better than he declares himself, viz. to say, that he may demand the ward of B. by reason of the ancient use. Wherefore it seems to me hard in reason for the Abbot to maintain this action, for this cause; and however this cause do not serve, still it seems that the matter in law doth not help him, &c.—(51) FITZHERBERT to the same intent; and he agreed with SHELLEY as well in the exception to the count, viz. to the same use, and that it is hard to answer to that, as in the matter in law. And as to the exception of the count, he said, that alleging Tey and others to be seised to the use of B. was only conveyance, but the matter in deed was the feoffment made to Jenour and others to the use of Bokenham and his wife, &c. and for this feoffment he demands the ward, the which is by reason of the second use. And as to the power of the feoffee, he agreed that the law was clearly as SHELLEY stated, and the use is nothing in law, but is a confidence; the which trust might be broken, and for the same reason the use altered; for the common law doth never favour the use; for an use is not a right, nor is any action given in law, if a man be deforced of it, by which he may recover it; for it is an inconvenience and an impossibility in law, that two men severally should have several rights and fee-simples in one and

Vaugh. 944.
2. Inst. 272. b.

8. Co. 140. 131. a. 139.

and the same land *simul et semel*; wherefore he thought that it is in the power of the feoffees to a trust to break the use and trust, and alter it at their pleasure. (53). And here it appears clearly that the use is transposed, and altered in another course and form from that it had before. For here is the wife who takes jointly with him; and she has it in all by the survivor; wherefore it follows that it is not the same use that it was before. For suppose that the use was limited to *Bokenham* and his wife in fee, is that the ancient use? By no means; for then the wife took nothing. And it is as if tenant in tail enfeoff the donor and a stranger; that is a discontinuance conditional, viz. if the stranger survive; wherefore he thought the action not maintainable.—(54.)

BALDWIN, *Chief Justice, to the contrary*. FIRST, It is clear by the rules of the law, that feoffee to a trust and use has the entire right to the land to lose, give, and charge it at his pleasure. And also I will agree that they may * dispose of the use to any stranger at their pleasure; but to give the use to him who had it before is not good, for it is a common maxim, that a man cannot give me that which I have already, for that would be impertinent: as if tenant in tail enfeoff the donor, that works no discontinuance, inasmuch as he cannot give to him a fee-simple which was never out of him. (55) So if a feoffee to an use make a feoffment in fee without consideration to the use of the first feoffor, clearly that is the ancient and very same use which was in him before, and was never altered; and yet I will agree, that so far forth as the use is altered by the limitation of the feoffees, of so much is the use a novel use, and of no more: as if the feoffees make a feoffment in fee to the use of the feoffor in tail, that is a novel use in tail, for that of so much the first use is altered, and of the residue it remains to *cestuy que use*. For it seems to me that the limitation of the remainder of the use after the death of the wife of *B.* is void, for he had that before: and then the case is no more than that the feoffees make a feoffment in fee to the use of a stranger for term of life, without more. Is it not clear that

Co. Litt. 123. a.

Plow. 352.

41. E. 3. 21. a. 9.
E. 4. 24. b. 9. H. 7.
25. Co. Litt. 335. a.

[* 12. b.]

[Plow. 545. note (f).
Edit. 1761. & 1. Black.
Rep. 188.]

Litt. 625. Dyer, 20. a.
Co. Litt. 23. a.

Vaugh. 42. Hob. 22.
280.

[2. Wilk. 19.]

4. Mar. 134. a.

1. Inst. 22. b. 163. a.
Post. 55. a. 163. a.
Pal. 49.

(55) In *† Browne's case*, M. 8. Jac. at *Serjeants' Inn*, it was resolved by the two *Chief Justices* and *Chief Baron* without argument, that if a man make a feoffment to his own use for life, and afterwards to such persons as he shall name in his will, still the fee is in him. And they resolved, that if a feoffment in fee be made to the use of the feoffee for life, that this expression of a particular estate does not make the remainder of the use to be in the feoffee without consideration.

the reversion of the first use always continues in the first feoffor? Yes, truly: and then it is sufficiently clear, that for this reversion of the use, the heir of *cestuy que use* shall be in ward. (57) So also is the law, if a lease be made to two, afterwards the lessor grants the reversion to one of them in fee, and he accepts the deed, which is attornment in law; if the grantee die, his heir shall be in ward, because the reversion was holden; and the other joint-tenant who survived shall have the entire land by the survivor, and he was never tenant to the lord, as he would be if the remainder were in tail, remainder over in fee, &c. (58) So it well agrees with the case which MARVYNE put of a feoffment by collusion, that by the feoffment over the collusion was clearly determined; and a difference between the case of a collusion and of a condition, which is reserved always by the feoffor; the which is knit with the land, so that twenty feoffments with descent cannot toll the condition. And besides he said, that if the case were that the feoffees to the use were disseised, and the disseisor make a feoffment to the use of the first feoffor, that is a new use, and not the ancient one: for by the disseisin of the feoffees the ancient use was extinct during the disseisin; but the case here was quite otherwise, for the first use was never gone; wherefore, &c. (59) And the case of Lord Roos put by WILLOUGHBY was a stronger than this is, viz. If a man were *cestuy que use* of two acres of land, the one of them holden of one lord by priority, the other of another lord posterior, and the *cestuy que use* made a feoffment at one and the same time * of both acres to his use, in that case it was holden and ruled that the priority should take place as before, and not the equality of tenure, for that the first use remains *unus et idem usus*. And yet there the *cestuy que use* himself entered, and made there a feoffment, wherefore *à multò fortiori* in this case. Therefore he thought that the heir shall be in ward. (60) And as to the exception that is taken to the count, it appears to me of no avail; for when he says, "and the said Jenour and others" so being seised *ad eundem usum*," that is no more than if it had been *ad talem usum*; and he has shewn before the entire

21. H. 7. 19. a.
39. H. 6. 2. b. Co. 2.
60. b. 67. a. 62. b.
Fitz. Gard. 8.

23. H. 6. 14. b. Inf.
128. Litt. 391. Perk.
218. 1. Co. 121. b.

27. H. 8. 29. b. Hob.
27. 1. Inf. 23. a.
Moor, 285.

[* 13. a.]

(60) And afterwards the party agreed without judgment, and the demandant had the ward; and so is the law taken to be at this day, that such heir shall be in ward, because such estate is as an ancient reversion, and not a novel remainder. By Benloe's fol. 21. cap. 8.

manner of the use : and although he says *ad eundem usum*, and means the second use, yet inasmuch as this is great doubt and matter in law, whether this be the first use or a novel use, of which the Abbot is ignorant, and hath put the determination and discussion of this in the discretion and order of the law, and he hath disclosed his title and matter in good form, it is unreasonable that he be under any disadvantage upon that account, and it is our business to aid him. As if a man bring an action of debt against one for rent-service, the defendant confesses the action, yet the Court, who is a third person, shall take order of that matter according to law, viz. that the plaintiff recover nothing by his action. Wherefore he thought the action brought by the Abbot is maintainable,

Plow. 230. b.

20. H. 7. 1. 28. H. 6.
8. Perk. 623. 119. a.
10. E. 4. 8. a. Plow.
66. 84. b. 3. Cro.
425. Dyer, 134. a.

(61) **A** MAN gives certain goods with his daughter to one in marriage, and then they are divorced : the question was, Whether the wife should have the goods back ? And by FITZHERBERT and BALDWIN, it seemed reasonable that she should have them, inasmuch as the cause and consideration of the gift is now defeated ; for the goods were given in advancement of her marriage, and *cessante causâ*, &c. As if a man make his executors, and enter into religion, and then be deraigned, now he shall have back all the goods which the

In case of a divorce the wife shall have back any goods which were given by her father in marriage with her, and are undisposed of.

26. H. 8. 7. a. F.
Detinue, 61. Prohibition,
21. Fit. 44. c.
139. a.
Post 147. b. Litt. §.
200. 4 H. 7. 14. a.

(61) Co. 8. 73. a. If the husband aliene his wife's land, and they be afterwards divorced *causâ præcontractâ*, or any other divorce which dissolves the marriage *à vinculo matrimonii*, the wife, during the life of the husband, may enter by the statute of 32. H. 8. c. 28.

M. 24. & 25. El. B. R. Rot. 842. Φ *Bunifer's* case. A woman married to I. S. and within age of twelve years disagrees, and marries another, the second marriage was resolved to be good, but no judgment given. But in *Babington* and *Warner's* case, M. B. R. Rot. 668. [Moor. 575.] in an action of debt the second marriage was adjudged good, where the woman, within the age of twelve years, dissents to her husband. And so was the opinion of NOY, Attorney General, and HARRISON, *Lesser of Lincoln's Inn*, Lent 1632. And the reason given by NOY was, the Church providing against a change of lust had prohibited divorces, but here beneath the age of twelve years there was no such mischief, and that before seven years it shall not be called *spousalia*, at which age they are *nuptiæ incognitæ*, and therefore they ought to be given till twelve, when they are *nuptiæ perfectæ et consummatæ*.

NOY, Attorney General, held that marriage *per duresi* was good, contrary to the opinion of FAOWICKE in Keilw. 52. b. and his reason was, because otherwise, upon such allegation, divorces will be frequent, to satisfy the lusts of men. And he cited 31 E. 3. Spi. Tit. *Atach. fur prohibiti*. 8. & 11. H. 4. 13. Swinborne, 241. Φ Polams. 160.

E. 7. 1. King John, Rot. 19. *Affize* came to recognize if *Amice* wife of Earl Clare and others have unjustly disseised Richard, son of William of Sudbury. The countess says, she the countess, for lineal consanguinity, by precept of the pontiff, was separated from her husband Earl Clare, to whom the vill of Sudbury was given with her in marriage, came to Sudbury and convened her court, and made the said Richard be summoned. *Ex libro* M^o. NOY.

F. N. B. 44. c. Bro.
Deraignment, 18.
38. H. 6. 7. b. 4.
H. 7. 14. a. 18. E. 4.
29. b. 27. H. 8. 15. b.
19. Aff. 2. 3. Mar.
126. a. 12. Aff. 22.
Fit. Verdict, 31. 415.
3. Aff. 91. Pl. 58. a.
Perk. 238. Dy. 147.
b. 9. Co. 139. a. 10.
50. b. 8. 73. a. Cro.
104. b. Perk. 238.
7. H. 4. 16. b. by
Therning. Inf. 22. a.
11. H. 7. 4. b.
[1. Ld. Raym. 521.
Cro. Eliz. 908.]

executors have not consumed; so here the wife shall have back the goods not spent, and her lands together; for possibly they might have been divorced *causa præcontractus* testified by two false witnesses.—(62) SHELLEY. Yet if they of the spiritual court give judgment in any cause, be it true or false, until it be reversed and defeated, it shall bind all the world; as in our law a recovery upon a false oath binds until it be defeated by attain. But as to the case 19. E. 3. [Fitz. Affize, 83.] the Book is, that if land be given in frank marriage, and after the donees be divorced, he by whom the cause of divorce was first moved, shall lose the land. As if the wife sue it, the husband shall have it, and *à contra*. (63) And FITZHERBERT said, That there is another Book of this case, which says, that the land shall be divided between them, &c. And note, That about the 26th year of the present king, in evidence * given on a writ of detinue, the Court were of opinion, that if a wife hath goods, and afterwards the husband and she be divorced, all the goods which are not spent she shall have back, &c.

[* 13. b.]

A presentment of bloodshed in a court leet cannot be traversed, *secus* of purpresture, nuisances, what toucheth the freehold. Note, Keilw. 66. and 2. R. 3. 14. b. 41. E. 3. 27. a. Dy. 134. pl. 14. F. Bar. 271. 19. H. 8. 11. 5. E. 3. 9. a. 8. b. 5. H. 1. 4. a. 21. E. 3. 4. F. Affize, 142. Cro. 67. 2. Inf. 71, 72. [Kit. 42. 3. Bur. 1530. Cowp. 458. 1. Hawk. Pl. C. 420, 421.]

(64) AND at the same time SHELLEY said, that a presentment of bloodshed in a leet could not be traversed, for by the old Books it is taken for gospel, if it pass on the same day in which it is presented. But of a presentment of purpresture, nuisances, or any such thing as toucheth the freehold and inheritance, a man shall have a traverse to that. And this diversity hath been always taken for law, inasmuch as it is the very determination and end of law.—Which BALDWIN agreed to.—FITZHERBERT said, that Britton, who is good authority, says, that every presentment is traversable which is presented in a leet; and so in the sheriff's torn, out of which leets at first were derived, &c.

Lease to husband and wife by indenture, with proviso, "that if they be disposed to aliene, the lessor should have the first offer, he

(65) A LEASE is made to husband and wife for years by indenture; and there is a *proviso*, "that if they or their executors be disposed to sell and aliene the term, that the lessor shall have the first offer or advancement, he giving therefore

(65) 27. E. 3. 9. Upon assignment of dower an husband and wife grant a rent for owelty of partition—the wife is not chargeable with this rent after the husband's death.

"as another will give." FIRST, Whether this word, *viz.* *proviso*, shall be a condition or only a covenant? And it seems by SHELLEY, that it clearly makes a condition. But FITZHERBERT and BALDWIN doubted; and BALDWIN said, That if it be but a covenant, then after the death of the husband his wife shall not be bound thereby, inasmuch as it is solely the deed of the husband, whose covenant shall not bind the wife; but if it be a condition, then she shall be bound by that, inasmuch as his estate is tied down with it, and it was the pleasure of the lessor who chose to reserve such condition, and she cannot hold that otherwise than as it was given.—(66) SHELLEY *à contra*; for she took this term by the husband; and reason sees that his covenants should bind the wife; and especially such a covenant as concerns and arises from the estate. And he agreed to the case which KNIGHTLEY put of 38. E. 3. [8. a.] where a feoffment was made by deed with divers covenants, and one of the feoffees sealed it, and the other not, but occupied and survived, and adjudged that he should be bound by the covenants and seal of his companion. (67) And see 45. [E. 3. 11. b. 12. a.] a good case of covenant, what shall bind the wife, and what not. And then it was moved besides, Whether the lessees, when they are disposed to sell the term, and come first to the lessor according to the condition, are obliged by the law at first to say to the lessor, "Sir, will you please to 'have the term? for I. S. will give £.100 for it," &c. (68) SHELLEY thought that they are not bound to do so much, but to ask him generally, whether he will give as much * for the term as another will; and if he shall refuse, they are not bound to shew more to him. But if he say that he will, then it is necessary for the lessee to shew in certain what man will give more, &c. And another question was also asked, Whether the lessees are bound to delay their sale, if the lessor, when he is examined, shall say that he wishes to pause or take breath in the matter?—And SHELLEY and FITZHERBERT held, that they are not bound to wait so long, for it may be that another will give him £.100 immediately,

"paying as much for, "it as another would," whether this be a condition or only a covenant?

27. H. 8. 15. b. 9.
H. 6. 35. a. 5. El. 222.
a. Bro., Condition,
195. 2. Co. 72. 79.
Dy. 19. 6. b. 152.
Co. Litt. 203. a. Dy.
319. 4. 139. a. 10.
Co. 43.
[2. Co. 70. 1. Lev.
155. Cro. Eliz. 242.
Sheph. Touch. 119.
159.]
1. Roll. Ab. 421.
2. Roll. Rep. 64.
Plowd. 14. b. Bro.
Det. 38. F. Avowry,
95. 2, 3. H. 4. 19.
b. 1. 21. H. 6. 24.
5. Co. 16, 17. 15.
E. 4. 29. b. Co. Litt.
131. a. § 374. F.
Covenant, 18. Litt.
83. 2. Dy. 227. a.
Bro. Covenant, 32. a.
3. Bull. 163. Moor.
400. 1. Inst. 231. a.
203. 250. Jon. 268.
Jon. 309. 3. Roll.
Rep. 63.

[* 14. a.]

2. Co. 3.
Dy. 337. 8.
14. H. 8. 19. a.

(67) 25. [45.] E. 3. 11. b. 12. a. It seems that the covenant binds the heir; for he shall not be charged if not by reason of debt. See 25. H. 8. [Br. Ab.] Cov. 32. that this is collateral. If a man lease a messuage for years, and lessee covenant that he and his assigns shall repair the house, and then the lessee grant this over, and the assignee do not repair it, covenant lies against the assignee. But this seems good reason; for he is bound to repair it on pain of waste, and therefore it differs from the case here.

Dy. 92. a.

and it would not be reasonable to defer the sale; but it is necessary for the lessor to say *Yes* or *No* immediately; and so the condition is then determined, &c.

An action will lie against executors on a covenant of their testators, though they are not mentioned in the deed.

10. H. 7. 18. b. Dy. 214. 257. 4. E. 3. 57. b. F. Voucher, 212. Executor, 77. 43. E. 3. 17. 2. H. 6. 22. F. N. B. 145. h. 6. H. 4. 3. b. 21. H. 7. 4. a. Plow. 45. 7. a. 30. H. 7. 18. 45. 47. 48. E. 3. 17. 22. 2. a. *Infra*, 27. a. Bro. Covenant, 11, 12. 28. Dy. 271. a. Wentworth, 168. 180. 1. Inst. 209. a. Winch. 108. [Cowp. 374, 375, 376. Cro. Eliz. 552, 553. 1. Com. Dig. 242. (B. 14.) 2. Vern. 322. Shep. Touch. 174.]

(69) **WILLOUGHBY** asked of the Court, If lessee for years covenant for himself by the indenture of lease, that within the three first years he will build a new house, and after the term finished, he die the covenant not performed, and the lessor for that breach bring a writ of covenant against his executors, Whether this lies, or not? that was the matter. And **SHELLEY** and **FITZHERBERT** thought that it would. But it is otherwise of heirs, for the heir shall not be charged without naming him, but the executor shall. And so is 47. E. 3. 23. But **BALDWIN** said secretly, That there is a diversity between an obligation in which no mention is of the executor, for that it is a duty; but covenant is executory, and sounds only in damages, and a tort, which (as it seems) dies with the person, &c.

Goddale's Cafe.

In debt upon a lease for years *non habuit nec occupavit* is a bad plea, otherwise of a lease at will.

20. E. 4. 9. a.

24. H. 8. 4. b. 34.

H. 6. 21. a. 11. H. 6.

33. 18. H. 6. 1. a.

Plow. 423. b. Keilw.

65. b. [Com. Dig. Pleader (2. W. 50.)]

(70) **A BILL OF DEBT** against *Goddale*, attorney, and count upon a lease of a messuage for a term of years; and the defendant pleads, *non habuit nec occupavit præd' mess' &c.* and demurrer in law upon the plea; and ruled without argument to be no plea. But by **FITZHERBERT**, it is otherwise of a lease at will, &c.

(69) 24. Eliz. in *Prichard's case*, upon a prohibition to the court of requests, **YELVERTON** said, That oftentimes it had been adjudged that an action upon the case lies not against executors upon a collateral *assumpsit*. But **WILLIAMS** doubted of this in the argument of this case. Pl. 69. Mr. **GLYNN** put this difference of actions personal (of actions personal which sound only in tort and damages), where there shall be a covenant, that the action commences at its creation by the consent of both parties; but tort commences by the act of one without consent of the other. And the tort for feoffor dying, there *actio personalis moritur cum persona*. And this difference was put by **DODDERIDGE**, Justice, in the argument of *Mason and Dixon's case*, [Lat. 167. Poph. 189. W. Jones, 173. Noy. 87.] in C. B. H. 3. Car. and so the action doth lie.

Jopson *against* Underdon.

(71) **NOTA**, In the inquest of *Sussex* between *Jopson*, one of the six clerks in chancery, and one *Underdon*, it was given in evidence that *Underdon* ought to have enfeoffed four by a deed which was not shewn in evidence, *propter suspic' facti*. And the witnesses examined said, that they were present at the livery of seisin taken and delivered by *Underdon* to one of the feoffees, the other three being absent. And *MOUNTAGUE* said, that clearly, if four were enfeoffed without deed, and only one had livery, nothing passed to the others without deed; which was not contradicted by the Court.

If feoffment be made to four, and livery only to one, nothing passeth to the others unless it be a feoffment by deed.
10. Co. Dr. Leisfield's Case. 1. Inst. 49. b. 359. a. 2. And. 196. 14. B. N. C. 341. 39. Dy. 35. a. 10. 15. 18. E. 4. 1. 18. 32. a. 11. E. 3. 41. a. 17. H. 6. 9. a. 33. H. 6. 17. a. 22. H. 6. 1. per Markham, 5. Co. 95. a. [Co. Lit. 48. a. Sheph. Touch. 215.]

(71) Note, 4. E. 2. [Fitz. Ab.] *Monstrans de Fait*, 40. Land is given to husband and wife, and to the heir of the husband; the husband dies, his heir shall not be received upon default of the wife without shewing the deed.

* Bold *against* Molineux.

* [14. b.]

(72) **RICHARD BOLD** brought an action of debt *against* *Molineux* for thirty pounds upon a bond endorsed with this condition, "That if it fortune *Johan Molineux* to decease afore the Feast of *St. John the Baptist* which shall be in the year of our Lord God 1533 without issue male of her body by the said *R. Bold* lawfully begotten *then living*, that then, &c." And the defendant said, that after the making of the aforesaid writing, and before the said Feast, &c. the aforesaid *Johan* at *B.* in the county of *Lancaster* died without issue male of her body by the aforesaid *R. B.* lawfully begotten *then living*, and this, &c. And the aforesaid plaintiff says, that he ought not to be barred, because he says, that after the making of the aforesaid writing, and before the aforesaid Feast, *viz.* on the 12th day of *June* in the year, &c. the aforesaid plaintiff at *M.* in the county of *Lancaster* took to wife the aforesaid *J.* and they had issue between them *Henry Bold*; and afterwards, and before the aforesaid Feast, the said *Johan M.* at *B.* aforesaid died, the aforesaid *H.* the son of them *R. B.* and *J.* at the time of the death of her the said *Johan then living* and in full life at *B.* aforesaid; and afterwards, and before the aforesaid Feast, *viz.*

The condition of a bond being, "that if the wife of the obligee die before the Feast of *St. John the Baptist* without issue male of her body *then living*, that then, &c." the words "*then living*" shall refer to the time of the Feast, and not to the time of her death. Where the issue is, Whether *A.* be alive or dead? the party who pleads the death need not shew the place of the death, for the *venue* shall come from the place where *A.* was alleged to be alive.

E. 26 & 27. H. 8. Rot. 331. Jenner, according to the report of Benlowe, fol. 13, 14. S. C. 1. And. 1. S. C. 2. Roll. Rep. 428. 15. Jac. Cro. 144.

1. Roll. Rep. 143.

1. H. 7. 3. a. 20.
Ed. 4. 18. a. Cro.
Jac. 451. 46. 1. Leo.
172. 240.

[Cro. El. 388, 389.
Foph. 101.]

Swinborne's Wills and
Testaments, 166. pl.
13.

3. Mar. 164. b. 2.
H. 4. 1. 3. b. 32.
H. 6. 20. a. Finch,
3. b.

By. 16. b. 216. a. 8.
Co. 88. 18. 25. 42.
44. E. 3. 28. a. 44. a.
20. a. 40. a.

* [15. a.]

Dy. 28. a. 19. b. 338. a.

on the aforesaid 12th day of *June*, *H.* at *B.* aforesaid died, and this, &c. And the defendant upon this demurred in law.

(73) And the matter in law is all upon the construction of the words "*then living*"; namely, Whether "*then*" shall have relation to the Feast of *St. John the Baptist*, or to the death of the said *Johan*? And MOUNTAGUE thought the last Term that it shall have relation to the Feast; for this word "*then*" is an adverb of time, and hath always relation to a "*when*," and it shall be referred to a time certain, and not to an uncertain time; for it is true, *quod quilibet debet mori*,

sed tempore quando nihil incertius; and therefore it ought to be referred to a time, *viz.* the Feast, which is a thing certain, and not to the death of *Johan*, which is uncertain. (74) And also "*TUNC*" *significat tempus extremum* by the civilians: as if a man be bound to another upon condition to abide the award of *J. S.* so that it be made before *Easter*, one week before the Feast the obligor comes to *J. S.* and requires him to give notice of the award, and he refuses, still hath he not performed the condition, inasmuch as *J. S.* was at liberty to have given notice of the award any time before the Feast. So by construction of the rules of grammar, when a thing is doubtful, and may be referred to a double intent, *ad proximum antecedens fiat relatio*, and that is the Feast. (75) And the plea of defendant is true, *viz.* that *Johan* was dead at the said Feast without issue male, although she had issue at the time of her death, yet since this issue is dead before the day, &c. And this the common case proves, *viz.* Where a man brings formedon in the reverter he shall say, "and " which after the death of *J. S.* ought to revert to the " said demandant, for that the aforesaid *J. S.* died without " heir of his body issuing," although that *J. S.* had sons, yet since these are dead without issue of their bodies, now it is adjudged that the donee died without issue, &c.

(76) And so for another reason the plaintiff shall not have judgment to recover; for the replication is ill, because the plaintiff hath not alleged where the issue * was born which is issuable, and very material; and upon the whole pleading thus uncertain the defendant hath demurred in law, wherefore he taketh advantage of that: and it is like a case in 35. *H. 6.* [50. a.] where an annuity was granted to a man until he was promoted to a benefice, and the grantee married; and for arrears before marriage he brought an action

dion of debt, and shewed this matter; and inasmuch as he did not shew the place where he took his wife, which is the substance of his matter, the action was not maintained; wherefore, &c.—(77) WILLOUGHBY, argued to the same intent and in the same effect.—KNIGHTLEY, BROWNE, and MARVYNE *à contra*. And first as to the exception to the replication, because the place where the issue was born is not alleged, it seems that it is well enough; for first it is alleged where *Bold* took *Johan* to wife, and where she died, and where her issue at the time of her death was alive, *scil.* at *B.* and that afterwards he died at *B.* so that if issue were taken whether she have any such issue, it shall be tried where the life of the issue was alleged, &c. And so inasmuch as he hath demurred in law to the plea, which makes mention of a place where the issue was alive at the time of the death, and where the issue died, it is confessed by the party that he had such issue born, &c. (78) As if in debt on bond it is proper to allege a place where the bond was made whence the *venus* shall come, and if there be default of place the count is not good; yet if the defendant plead that the bond was made by dures at *B.* now the count would be good, inasmuch as the deed is confessed, &c. So here; wherefore, &c. And as to the matter of law, it seems that the “*then living*” shall refer to the death of the wife, and not to the Feast, although the Feast be the next antecedent. First, if a man will speak of the constructions of relations in our law, commonly when an obscure thing comes in construction of law, men will construe the intent of the parties. (79) As in obscure statutes, and those which admit of a double intendment, and not an express intention, the intents and minds of the makers are to be construed; and in every deed and condition (which are private laws between party and party) a reasonable and equal intention shall be construed, although the words sound to a contrary meaning: as if I grant an annuity to you till you have purchased five shillings of rent, and you purchase five shillings jointly with another, that is not performance of the condition; for my intent was, that you purchase five shillings to your profit solely, and for your advancement of so much. (80) So is the law, if I be bound to you in an obligation upon condition that if you purchase a rent of five shillings *to have and receive* to you and your heirs, and a stranger have five shillings rent

28. H. 6. 1. b. 4.
H. 7. 6. a.

39. H. 6. 49. b. In-
fra, 39. b. pl. 191. a.

[2. Ld. Raym. 1039.
6. Mod. 222. 2. Vent.
72. 1. Ld. Raym. 344.
Str. 8.]

Dy. 21. a. 39. b. 34. b.
5. H. 7. 1. 4. Co.
71. b. Dy. 139. b.
11. H. 4. 23. a. 11.
H. 7. 24. 5. H. 7. 10.
24. b. 14. b. F. Issue,
83. Plo. 149. 2. R. 3.
13. a. 6. E. 4. 11. a.
3. H. 4. 5. a. 4. E. 4.
14. b. F. Annuity, 54.
6. H. 7. 7. a. 18. E. 4.
16. 7. Co. 25. 8. Co.
120. b. 133. b. Cas.
Jac. 682.

Plow. 467. 3. Co. 7. b.
Perk. p. 307. Plo.
10. a. 6. 71. 140.
3. Eliz. 191. a. Perk.
fol. 159.

[Sir Thomas Raymond,
464.]

37. H. 6. 26. a.

* [15. b.]

Perk. 266, 267. fo.
158. b. Plow. 7. a

Co. Lit. 385. b. Finch,
3. b. Inst. 20. b. 20.
H. 6. 36. a. Plow.
5. a. 5. H. 4. 4. a.
12. H. 8. 46. Dy.
46. b. 2. Co. 71. 9.
E. 4. 48. a. 9. Co.
47. b. 4. H. 6. 1.
11. H. 6. 53. b. 7.
H. 6. 8. Fit. Avowry,
258.

Dy. 18. a.

Perk. 178.

16. E. 3. F. Brief,
652. Dy. 376. b.

rent out of your land, and then he releases all his right in the land to you, still the condition is performed; and * nevertheless the words were never performed, for they were *to have and receive* the rent, the which you cannot do out of your own land, and yet the intent of the condition is performed. So here the intention of *Molineux* was, that *Bold* should have the money if *Johan* should have issue at the time of her death; and for that reason the Feast was limited for the greater profit of *Bold*, that he should have the money the sooner. (81) And we will agree with the maxim, that *ad proximum antecedens fiat relatio, si sententia non impediatur*, for in many cases the relative shall not refer *ad proximum antecedens*: as if a man make a lease for life, remainder over in tail, remainder to three *in formâ prædictâ*, that does not refer to the estate-tail the which is next before, but to the first estate, for that there wants the word "*heirs*" to make them have an estate-tail. So a man is bound to abide the award of *J. S.* and he awards that one party shall pay before such a Feast ten pounds to the other, and that *then* he shall make him a release; shall this "*then*" be referred to the Feast? By no means, but to the time of payment clearly. So it is where *J. S.* bargains and sells his land to *J. N.* for ten pounds, and *the aforesaid John* covenants to deliver the evidences of the land, this shall be intended the first *J. S.* the vendor, who by common intent hath the evidences. (82) So it is a Book case [22. E. 3. 4. a. pl. 4.], A man granteth to one such pension as *J. B.* hath *donec sibi provisum fuerit de competenti beneficio*; this word "*sibi*" is ruled to refer to the grantee, and not to *J. B.* wherefore, &c. So in a *cui in vitâ* brought by a wife, the writ is *cui ipsa in vitâ suâ contradicere non, &c.* this word "*suâ*" shall not be referred to the next antecedent, *scil. ipsa*, but to the husband; for otherwise

(81) A lease was made to one for life, with sufficient haybote, &c. without impeachment of waste; and the opinion of the Justices in C. B. by *FOSTER, M. 6. Jac.* was, that impeachment of waste should refer to the estate for life, and not to the haybote, for those are given by the law, and *ad prox.* &c.

If land be given to one in tail, remainder *in formâ prædictâ*, this remainder shall be tail; but if it be given for life, remainder in tail, remainder *in formâ prædictâ*, for the uncertainty to which estate it shall be referred, it is void. 1. Co. 51. 8. Co. 155. Perk. 181. 22. H. 6. 15. [Co. Lit. 20. b. 1. Vent. 368. Carter, 104. And see 1. Roll. Ab. 839. pl. 2.] and to have estate for life by limitation, and remainder over without any respect of limitation; but if the remainder had been *in eadem formâ*, that would have been tail, *quia eadem refertur ad proximum antecedens, sed prædictâ non habemus.* Plow. in *Quere* 42. [39.] Co. Lit. 345. & 20. b. In the argument *M. 22. & 23. Eliz. & Dixon's Case*, *GAUDY* put this case: *A.* devised his goods to *B.* and *his heirs*, and then devised his land to *B.* *in formâ prædictâ*; *B.* has the fee, and yet the word *heirs* in the devise of goods was void.

the sense would be imperfect. So *then living* shall be referred to *when dying*, for *omne tunc vult habere quando, sicut tale quale, &c.* And in *Hilary* 28. it was again argued, (83) and SHELLEY, *Justice*, thought that the plaintiff should recover. Indeed the case has been well argued over at the bar, and several good grounds of constructions of deeds recited, and also rules of grammar and maxims of civil law, that *tunc* signifies *tempus extremum*. And as it seems to me these will well serve my purpose. And it appears to me that *then living* shall necessarily refer to the death of *Johan*, and not to the Feast; for to say that it shall refer to the Feast, is impossible; for the Feast is only as a cypher in arithmetic, the which cypher by itself makes not any number, but when it is placed after the number 4 it makes forty, and two cyphers make it four hundred, and so more, a greater number, &c. So this Feast is not part of the performance of the condition. (84) For if the condition were, that I should pay to the obligee ten pounds before the Feast of *Easter*, now I agree that I am at liberty at any time before the Feast to perform the condition; but if I tender the money at the Feast, clearly the obligee is not bound to receive it, * for the bond is forfeited; for when the condition ought to be performed before the day, the day is not part of the time in which the obligation may be performed; and it is as if I be obliged to enfeoff you of one acre of land lying between *Whiteacre* and *Blackacre*, I cannot enfeoff you of *Whiteacre* nor of *Blackacre*, but of one acre between them. (85) The law is the same, if I be bound to enfeoff you of a manor between the manor of *St. Alban's* and the manor of *Barnet*; if I enfeoff you of the manor of *Barnet* or of the manor of *St. Alban's* I have not performed the condition, for the two manors are but as cyphers in arithmetic, and limited to no other purpose but to abut the limits of the performance of the condition. (86) So if a man be bound to pay certain money between the Feasts of *Christmas* and *Easter*, the two Feasts are not parcel of the days of payment, for there is no difference between limitation of time and limitation of place, &c. Then here to say that *then living* shall be referred to the Feast *quia tempus extremum*, it is not possible to do this, for, as I have argued before, the Feast is not parcel of the time of the condition to be performed *causâ quâ supra*; then this exposition *excedit tempus extremum*,

Swinborne, 166. pl. 13.

6. H. 7. 3. b. 36.
H. 6. 15. b.

* [16. a.]

Post. 12. a.

mum, because the Feast is of little effect; for if I make such condition, that if I marry your daughter before such a Feast, and *then* also pay you twenty pounds, that then, &c. this "*then*" refers to the time of the marriage, which ought to be performed before the Feast, and not to the Feast, inasmuch as the Feast is not parcel nor material, *quia exclusum*, &c. (87) So here, as I can collect, the extreme time to which the meaning of the parties extends was the time of the death of *Johan*; and now by her death, she having issue at that time, the condition, *viz.* the consideration for which the money should be paid, is kept, although the issue die before the Feast. And I take a difference between a bond upon a condition which is entire, and necessary to be performed at one time, and where the condition is several, and may be performed at several times. (88) As if the condition be, that if I enfeoff one before such a Feast of a manor *discharged of all manner of rents*, in that case if a stranger have a rent issuant out of the said manor, and I make the feoffment, and afterwards at another day before the Feast I purchase a release of the stranger, yet the condition is not observed, inasmuch as the manor ought to have been discharged at the time of the feoffment, because this word *discharged* was in the present time, and ought to have been observed *simul et semel*, inasmuch as the condition was entire. But if the condition be, that I shall pay ten pounds, and build an house, and go upon your business to *St. Paul's* before such a Feast, now I may well do these acts on different days before the Feast, because the condition was not entire. (89) The law is the same, that if I am to pay one hundred pounds before such a day, if I pay the hundred pounds at five several days before the Feast, I have performed the condition; but if the condition were, that * I shall pay one hundred pounds before such a Feast on one day, I must elect at my peril the day on which I will pay the hundred pounds. The law is the same in this case here: this condition must be entirely performed at the time of the death of the wife; and so it was, and on one day, *scil.* the day of her death; for it is all one where the party have limited a day before the Feast that the condition shall be performed, and where the day of performance is limited by the act of God: for here God hath limited a day in which the condition was performed; *wherefore*, &c. (90) And yet a colourable case hath been
yell,

2. Co. 173.

* [16. b.]

well put from the other side, *viz.* in a formedon in reverter, the donor shall suppose that after the death of the donee the land ought to revert to him, because the donee died without issue of his body, although the donee shall have twenty issues. Indeed I have looked into the Registers, and the old Registers are in some Reports, "*because the issue died without issue*;" but the New Register, which is the best, is as hath been related; and I believe that the law is so, and the reason of it is apparent; for if the writ shall suppose that the issue died without issue, yet it may be that the entail is not spent; for it may be that the issue shall have uncles and brothers who descend from the body of the donee, and so are inheritable in tail; wherefore the land ought not to revert to the donor so long as the tail continues; and therefore the writ shall suppose that the donee died without issue, for that this dying without issue refers to the estate, *viz.* the gift in tail. (91) But here the dying ought to be referred only to the time, *viz.* to the time of the death; wherefore, &c. Also for another reason the condition shall be construed as I have said; for no man would question, if the words had been thus, "and if it happen *J. M.* before the Feast to die "without issue *then* living," *then* should refer to the death; and is it not all one sense to say, *before the Feast to die*, or *to die before the Feast*? Clearly the sense is not changed because the words are transposed: and if the sense be in both ways the same, why ought not the law to put the same construction on both? It seems to me that it shall; wherefore, &c.—NOTE, That FITZHERBERT argued much upon the intent of making of three bonds for the payment, &c. and every Feast was limited one year after the other in the condition of the bond; so that he gathers by this, that the intent of the parties very much inclined to have the issue continue *usq; ad extremum, &c.*—(92) FITZHERBERT *to the contrary.* First, The pleading is not good, for the demurrer in law is to the replication, and clearly by intendment the very matter in law appears for so much as the plaintiff hath shewn in the bar of the defendant; for the plea is, "that before the aforesaid Feast *J. at B.* died without "issue then living;" and the plaintiff shews the matter more plainly by matter in deed; but it is the same matter that by intendment the plea in bar contains; wherefore, &c.—(93) But BALDWIN thought the pleading good, notwithstanding,

4. El. 216. a. 8. Co.
38. 44. E. 3. 40. by
Kerton. 22. H. 6.
36. a. 25. E. 3. 49. b.
Fulb. 220. F. N. B.
220. 18. E. 3. 28. a.
29. E. 3. 4. b. Vid.
Register, 242. a. Dy.
14. b. 156. b.

* [17. a.]

5. H. 7. 13. Dy.
290. b.

4 E. 3. 45 a.

[Ante, pl. 77.]

34. H. 6. 45. 11. Aff.
28. 18. E. 3. 13. a.
21. E. 3. 28. b. 28.
H. 6. 1. b. 11. H. 4.
75. 6. H. 7. 6. a.
39. H. 6. 4. b. 39.
H. 6. 50. a. 2. H. 4.
7. a. 3. H. 7. 12. a.
35. H. 6. 50. by Prifot,
but Aston *contra*. 3.
H. 7. 7. b. 42. E. 3.
8. a.

38. H. 6. 3. a. 36.
H. 6. 23. 40. E. 3.
5. a.

39. H. 6. 2

Merk. 146

10. H. 7. 15 a. 6 H.
7. 3. b. B. N. C. 483.
269. *contra*.

standing, for that the plea of every man shall be intended most strongly against him who pleads it. And for that it shall be intended *primâ facie* that at the time of the death *J.* had no issue; wherefore it is well enough done by the plaintiff to declare the matter as he hath done in good form, and doth not require any traverse, because it is only intendment; wherefore, &c. Also there was another exception taken in the replication, inasmuch as it was not alleged where the issue was born, which is issuable.—(94) But to this FITZHERBERT said, that it is not the course for the plaintiff to allege where the issue was born, but where the marriage was had, and to say they had issue between them, without shewing where: and so where it comes in traverse whether such a man died without issue or not, the issue shall come of the *venue* where the issue was alleged to be in full life at such a place, and thence the *visne* shall come: as if dead and alive be in trial, it shall be alleged where the party is in life; wherefore the pleading, notwithstanding this, is good.—(95) And BALDWIN agreed to that. For another reason the place of the birth of the issue is immaterial; for it is confessed by implication from the plea of the defendant that *J.* had issue, namely, by these words, “*then* living:” *then* implies that at one time *J.* had issue, but at the time of her death she had not issue, and is in manner of a negative pregnant: as if in a writ of entry in *consimili casu*, supposing the alienation to be in fee, the tenant says that the tenant for life did not aliene in fee, this implies that he aliened, but not in fee: here, *then* in this place is tantamount to a negative pregnant; therefore to allege that which by implication is known to the defendant is superfluous: wherefore, &c. (96) And to the matter in law FITZHERBERT and BALDWIN were of a contrary opinion to *Shelley*. And first, they took the common ground, that every condition of an obligation is as a defeazance of the obligation, as well as if the obligation were single, and after the obligee made indentures of defeazance; and it is all one, for the condition is the assent and agreement of the obligee, and made for the benefit of the obligor; and for that reason it shall always be taken most favourably for the obligor: as if a man be bound in an obligation to pay ten pounds before such a day, the obligor is not bound to pay it till the last instant of the next day preceding the Feast,

for

for he hath all that time for his liberty of payment. (97) So is the law, if I be bound to you on condition to pay ten pounds before the Feast of *St. Thomas*, and there are two Feasts of *St. Thomas*, the latest Feast is that before which I am bound to pay, and not sooner, for that is most for my advantage. So when one matter may have many intendments, the matter shall be more favourably intended for the obligor; so it shall be here: *then living* may be intended different ways, *viz.* to the death or to the Feast; and because the Feast is the day farthest off, and most * profitable for the obligor to be so taken, it shall be so intended and construed. So we cannot say that these words, *then living*, are void; for in all conditions, a man ought to expound every word that purports a meaning of the parties, and shall not be taken for nothing: and here it well appears, that the words, *then living*, were put in for some purpose, and therefore are material. And yet if they shall refer to the death of the wife, it would be in vain to put them in; for the sense would be as perfect, and in a manner of the same effect, if the words, *then living*, should be referred to the death, as if the words had been omitted. (But *quærs* of this reason.) (98) And besides, if a condition, or words in deeds and statutes, have a meaning, they do not want interpretation; but if the words do not bear apparent meaning, but obscure, then the intention of the makers and parties shall be expounded. And here it appears, that *Molineux* had more regard to the continuance of the issue of *Johan*, than to the death of *Johan*; for the issue, who ought to inherit the lands of *Bold*, was the substance of the matter, and the chief cause of the gift of the money, then the death of *Johan* is not material. (99) And therefore it is the common practice of all men who give large sums of money with the marriage of their children as inheritors, that there are such covenants comprized in the indenture, *viz.* to pay five hundred marks at the Feast of *Easter*, every year one hundred marks, until the five hundred marks be paid; and there is at the end such a proviso, that if it happen that within the five years the child of the donor shall die without issue, then the payment shall cease, the law is held clear, that although the child die within

5. Co. 114. Plow. 70.
b. 172. b. Dy. 88. a.
7. E. 4. 3. a. Cro. 74.
b. Co. 6. 20. Moor.
888.
9. E. 4. 45. a. 3. H. 7.
3. b.

* [17. b.]

4. Co. Ognet's Case.

[3. Cro. 388, 389.
Poph. 101.]

(99) *Sir John Croine's* [*Gascoigne's*] Case. It was agreed between *A.* and *B.* in consideration of marriage, that *B.* should have of *A.* seven hundred marks annually, at *Michaelmas*, till four thousand pounds be paid; adjudged, that *B.* might have *assumpsit* after every *Michaelmas* till all be paid. This case was cited in the argument of *Hunt* and *Soine's* Case, 30. Elin. [Ow. 44.]

the five years, yet shall not the payment cease, so long as the issue lives; but if the issue die, the payment shall immediately cease. (100) So the special consideration for which men give such large sums of money with the marriage of their daughters, is, because the issue coming from their daughters shall be advanced to the inheritance of the land; and to the long continuance of the blood of the donors in this inheritance, the consideration of the donors principally extends; and for this, where the intent of the parties is always referred, and means to have continuance in one thing, that thing of continuance shall have reference, and be construed to the latest time that can be. (101) And to prove this, FITZHERBERT put two familiar examples. The one was the condition of an obligation, that if I engraft twenty crab stocks in the garden of I. S. before the Feast of *Michaelmas* next coming, *then growing*, that then, &c.: these words, *then growing*, shall refer to *Michaelmas*, which is the longer time, and not to the time of engrafting; for although they grow * at the time of engrafting, it may be that they perish before *Michaelmas*; but it shall be intended, that if they grow to *Michaelmas* they will continue. So it is if I am bound by a covenant to "make a mill before such a Feast, *tunc molens*," this word, *tunc*, shall have reference to the Feast, and not to the time of making the mill; for it is most profitable for him to whom the covenant ought to be performed, for the reason, that this mill is a thing which can have continuance. (102) So the law is of a covenant made to "build an house before such a Feast, *tunc stans*," or of covenant to "cast a bell before a certain Feast, *tunc pulsante*."—But they agreed that it does not resemble the case that was put, that where arbitrators make an award, that one of the parties shall pay to the other ten pounds before a certain day, and that *then* the other shall release to him all actions; this shall be referred to the payment of ten pounds, and not to the Feast, because that thing is not to have continuance; for when the money is paid, the intent is executed, and past, but otherwise it is in the other case. And suppose that the condition had been, that if *Bold* die before a certain Feast without issue *then living*, and before the day *Bold* dies his wife being *enccinte*, and at the Feast the infant is born, clearly the condition had been performed. (103) And BALDWIN said, That if *then living* should be referred to the death, he would prove that at one time

• [18. a.]

87. H. 8. 17. 19.

Dy. 15. b.

Dy. 229. a.

time the condition would be performed, and at other times broken; as if *Johan* had issue at the time of her death in religion, now she is dead without issue, because he is a dead person, and not inheritable; and afterwards at the Feast he may be deraigned, and then the condition would not be performed, which is impertinent. Wherefore, &c. (104) So **BALDWIN** put this case: A man makes a lease, reserving, before such a Feast, a pound of pepper, or of saffron; now before the Feast, it is in the election of the lessee which of the two he will pay; but after the Feast his liberty is gone, and his lessor shall elect which of them he will bring his writ of debt for, &c. And in the next Term, **ENGLEFIELDE** was of the same opinion. Wherefore judgment was given that the plaintiff should be barred.—*Quod nota.*

Register 241.
a. Co. 37. Dy. 109. b. 108. b.
9. 13. 18. E. 4. 37. 4. 15. 7. H. 6. 7. a. Cro. 78. a. P. 26. & 27. H. 8. Rot. 331.

(105) **I**T was moved upon evidence by **KNIGHTLEY**, that if one recover against me by common recovery, and then I enfeoff the recoveror, that he shall be seised to my use, for he shall be adjudged in by the recovery, and not by the feoffment, which **SHELLEY** and **FITZHERBERT** in a manner confirmed.

Recovery to the use of A who afterwards enfeoffs the recoveror, he shall be in by the recovery, and continue seised to the use of A.
4. Co. 71. a. a. Co. 58. 10. Ast. a. contr. per Skipwith.
[See a. Will. 19.]

(105) If a man at this day enfeoff a stranger without any consideration, the feoffee is seised to the use of the feoffor. Perk. 533. Dy. 96. Therefore intend that the feoffee in this case gave consideration. [See Dougl. 773. 5. and 1. Co. 127.]

(106) **A**MAN hath two lessees for years by several leases of lands in one county, and makes a feoffment of all his lands in the same county, and makes livery upon the lands of one of the termors, ousting him * in the name of all; nothing of the other lease passeth by the feoffment, inasmuch as the other termor hath an interest, and stays upon the land. But of a tenant at will it is otherwise, for there both lands pass, inasmuch as it is a determination of his will. But note by **KNIGHTLEY**, That if I be seised of land, and another is tenant at will to another man of land, into which I have right of entry; in this case, although I make a feoffment of all, and livery of seisin in that part which I am seised of, in

* [18. b.]

If a man have two lessees, by separate leases, of lands in one county; livery of seisin to a feoffee of all his lands in that county, made upon the lands of one of the lessees, in the name of the whole, passes nothing of the other's land. Says if he were tenant at will to the feoffor.

Mo. 250. 11. H. 4. 71. a. a. Co. 34. b. 131. a. 7. E. 4. 20. a. 19. H. 6. 56. a. 33. H. 6. 42. a. Perk. fol. 45.

(106) 21. H. 6. 17. Fitz. *Ayd del Rey*, 23. that by the death or feoffment of the lessor the will is determined by Newton.

1. Rol. Abr. 4. Inft. 49. a. Infra 33. a. b. 9. H. 7. 25. b. Litt. 12. 13. B. N. C. 307. Dy. 58. a. 283. 337. b. 13. H. 7. 13. a. 1. Rol. Ab. 6. 11. H. 6. 26. a. 2. Co. 32. a. 35. H. 6. 24. Perk. 232. Dy. 131. 38. H. 6. 28. [2. Bl. Com. 316. Bac. Ab. Feoffment (B. 2.) Com. Dig. Feoffment (B. 7.)]

the name of all, nothing paffes of my land, of which the other is tenant at will to a ftranger, inafmuch as this is not a determination of the will of the ftranger. So note the diverfity; where he is my leffee at will, and where he is leffee at will to another.

The wife of a termor continuing in the houfe avoids the livery made by the landlord to a feoffee; nor fhall this, though made in the name of the whole, be good to pafs an acre of land in view, and held under the fame leafe.

Note, 2. Co. 32. a. 19. H. 6. 56. Perk. 219. a. Aff. 1. 3. 29. Aff. 60. Dy. 363. 33. Fitz. Aff. 418. 33. H. 6. 42. a. 1. Co. 31. b. 21. H. 4. 71. 21. H. 7. 7. 2. Rol. Ab. 5. 1. Inft. 48. b. 49. a. 5. Aff. 8. Dy. 178. b. 46. E. 3. 25. 1. Rol. Rep. 441. Post. 33. 2. Rol. 56. 6. Co. 26. a. Plow. 152. 2. F. Feoffments and Fairs, 31. View, 134. 1. Co. 196. a. 38. Aff. 23.

1. Roll. Ab. 4. 7. 47.

Con. 1. Inft. 253. 2. Dy. 233. 131. B. N. C. 339. 340. F. Continual Claim, 11. 38. E. 3. 11. 38. Aff. 2. 25.

(107) **A**T another time this question arofe upon evidence to a jury by **KNIGHTLEY**. A man was feifed of a meffuage, and of a clofe adjoining to the meffuage, and made a leafe of the meffuage for term of years, or life; and afterwards made a feoffment of the meffuage and clofe, and delivered feifin in the meffuage (the termor being at market, and his wife and children being in the houfe) in the name of all: now it is to be confidered, whether the houfe paffed or not. And it feems not, inafmuch as the continuance of the wife and children of the leffee faved the right and poffeffion of the leffee. And yet **SHELLEY** faid, if he would waive the poffeffion after, he might take it by a diffeifin. But admit that nothing of the meffuage paffed, Whether the clofe which was in view paffed or not? And **KNIGHTLEY** was clear, that it did pafs, although the meffuage did not pafs, for that it is in view; becaufe many times, in the Book of Affizes, we fee the land pafs by the view. For if the jurors come near the land, and an hill is between them and the land, fo that they cannot fee it, yet the law adjudgeth that a fufficient view.

(108) But **SHELLEY** thought that the clofe would not pafs; for now it appears that the intent of the feoffor was not to make all the land pafs without livery, viz. by the view; but his intent was to have that pafs by livery of feifin, and for that purpofe he makes livery in the meffuage for all, which upon the matter doth not pafs. Wherefore, &c. And no man ever faw a livery by the view, unlefs for a caufe material to fuppofe in enforcing the matter: as if to fay, that the land was on the other fide of the Thames, to which the feoffor could not come for the water; or at the door of a church, when a man endows his wife of lands within the view, it is

(107) If the tenant have a boy upon the land at the time of the feoffment, that avoids the livery; *contra*, where the termor has beafts upon the land. Fitz. Aff. 418. Bro. Feoffment 66.

well enough, for that it is made in consideration of dower, &c. But KNIGHTLEY offered to demur clearly, notwithstanding the opinion of SHELLEY, if he had not had clear matter to disprove it, &c.

[Bac. Ab. Feoffment, B. 2. Com. Dig. Feoffment, B. 7.]
Post. fo. 33.

Draper against Capper.

*(109) **I**N trespass by one *Draper* against *Capper*, the writ was, "Wherefore he broke his close, and cut down trees in *D.*" The defendant justifies the trespass "in *S.* without this, that he is guilty of any trespass in *D.*" And exception was taken to that by MOUNTAGUE, for all shall be struck out, and not guilty generally. And so BALDWIN, *Chief Justice*, held: but FITZHERBERT said, that the special matter shall be entered on the roll; for it may be, that when two villis are adjoining, it is not known whether the place be in one vill or the other. Wherefore it is reasonable to enter this matter by evidence; and divers precedents had he seen here of this. But he said BALDWIN (spoke to save parchment. See 9. H. 6. [62, b.]

* [19. a.]

Trespass for breaking a close at *D.* Justification in *S.* traversing the trespass at *D.* amounts but to the general issue, not guilty.

1. Inst. 282. a. 283.
2. Cro. 45. 105. 342.
9. H. 7. 62. b. 43. E.
3. 23. b. 5. H. 4. 2. a.
46. E. 3. 3. a. 8. H. 4.
15. b. 8. H. 6. 34. 5.
38. H. 6. 8. b. 2. 27.
H. 6. 14. a. 1. 9. H.
5. 10. a. 14. H. 6. 22.
27. 28. E. 3. 98. b.
2. E. 4. 14. b. 22. H.
6. 35. a. Dy. 30. a.
10. H. 7. 27. b.
[5. Bac. Ab. Pleas (G. 3.)
Syst. of Pleading, 255.
Com. Dig. Pleading,
(E. 14.)]

(110) **B**ROWNE asked this question: A man makes a lease for a term of years of a manor, reserving wood and underwood; the lessee cuts down trees; whether an action of waste lies or not? And SHELLEY and BALDWIN thought it did not, inasmuch as the wood is not parcel of the lease, for it never was let; and the statute is, that a man shall not commit waste in terris, boscis, seu gardinis, sibi dimissis, and the wood here was not demised. But an action of trespass lies for him in this case. And it was further moved, whether by such reservation the soil and land where the wood grows

Waste does not lie against the lessee for cutting down trees reserved to the lessor by the lease.

Whether by this reservation the soil on which the wood grows be reserved?

44. E. 3. 34. b. 5. Co.
11. resolved. F. N. B.
59. a. Perk. §. 642.
643. 14. H. 8. 12. 3.
H. 6. 45. a. Plow.
361. a. 370. 4. Co. 62.

(110) E. 20. Eliz. C. B. A lease was made for years, except all manner of woods, and by the opinion of the Court, waste doth not lie for the cutting the trees.

T. 41. Eliz. *Lusford v. Saunders*. [1. Brownl. 241.] In waste, the case was, *Sir Thomas Sombwell* leased certain lands to *Sir Thomas Saunders*, for years, provided always, and it is agreed, that it shall be lawful for the lessor to enter, fell, cut down, and carry away all the woods and underwoods upon the premises. *Sombwell* grants the reversion to *Sir William Lusford* in fee. *Saunders* devises his term to his son and executor, who cuts the trees. *Lusford* brings waste, and well, for the proviso sounds solely in covenant; as 3. H. 6. 4. 5. & M. 41. & 42. Eliz. judgment given accordingly. So per Cur. C. B. E. 28. Eliz. [Cro. Eliz. 17. Co. Ent. Waste 695.] Waste by *Constance Foster*. But the lessor is put to his action of trespass at common law.

2. Cro. 437.
B. N. C. 295. 46. E.
3. 22. b. Bro. Refer-
vation, 39. Dy. 78 pl.
48. 11 Co. 49. b. 5.
Co. 11. 1. Leon. 49.
71. H. 7. 14
2. H. 4. 4. Co. Litt.
4. b.
3. Bulst. 290.
Post. 79. a.
[Bro. Grants, 167. 2.
Roll Ab 454. pl. 10.
455. Vin. Ab. Refer-
vation (U)].

be reserved; and it seemed to SHELLEY, not. (111) But he would agree, that if a man grant me his *wood*, and make livery, the soil where the wood grows passeth. And in writs of entry the course is 20 acres of pasture and 20 acres of wood; in this case it is demanded by the name of acres, in which case the soil also is recovered; but when it is not reserved by the name of acres, it seems that the lessee shall have the profit of the herbage. But it is right to be advised upon this case till another Term,

An action of slander does not lie by two jointly against defendant for calling them *two false knaves and thieves*.

(112) **A**N action upon the case was brought by two, for that the defendant called them *two false knaves, and thieves*; and shewed in proof of it, &c. And MOUNTA-

4. Co. 18. b. 8. E. 4.
5. a. 47. E. 3. 16. a.
17. b. Dy. 26. b. Re-
giste, 105. b. F. N. B.
392. K. 27. H. 8. 23.
14. H. 6. 9. b. 12. E.
4. 6. a. Note, Keilw.
55. a. but note li E. 60.
129. pl. 33. 8. E. 4.
647. 641. Pal. 313. 31.
a. Hawk. Pl. Cor. 342. 343.]

GUE intended to demur in law upon the writ, because the tort which one has by the words spoken is not the tort which the other has; therefore they ought to sever in their actions, as of false imprisonment; and of that opinion was the Court, &c.

(112) H. 33. Eliz. C. B. \dagger *Fitzbume's Case*. Husband and wife and their son brought an action for saying, that they had committed treason in coining of money; and adjudged, that it does not lie, for they could not coin.

T. 41. Eliz. Action on the case for slanderous words spoken by the husband and wife, PER CUR. does not lie, for they cannot speak together, and the wife shall not be punished for the husband, but the husband for her, and therefore the action is not well brought.

So if several causes of action be given against two, you cannot have a joint action against them, 7. H. 4. 9. a.

A bond, if sealed, is good, although it want the formal words "sealed with my seal," or "in witness whereof." Keilw. 34. b. 70. b. 41. Ow. 33. 1. Leon. 25. 312. Infra. 22. a. Co. 5. a. Co. Litt. 6. a. 35. b. 229. b. 40. E. 3. 2. a. 7. H. 7. 14. b. 128. Dy. 140. 21. E. 4. 81. 8. 32. H. 6. 35. 15. accord. [Cro. Eliz. 737. 2. Spr. 814, 815. Cro. Jac. 420. Mo. 3. 2. Co. 5. Wentw. Ex. 117.]

(113) **A**N obligation was thus, "*for the well and faithful payment of which I bind myself by these presents, dated, &c.*" and not said "*sealed with my seal,*" nor "*in witness whereof;*" wherefore it was asked of the Court, If such an obligation be good, or not? And it seemed to SHELLEY and FITZHERBERT, that the obligation is well enough, if a seal be put to the deed, &c.

*(114) **THREE** were bound in an obligation thus, "we bind ourselves, *et utrumque nostrum per se*, "*pro toto et in solido*;" and, Whether this bond were several or not? was the question. And it seemed to one, that it is not several, inasmuch as the *utrumque* is of two, *scil.* both; but the bond should be *quemlibet nostrum*, &c. when more than two are bound. But the Court thought the bond was good enough and several. *Quare.*

In a bond by three, "we bind ourselves *et utrumque nostrum*," is a several bond.

14. El. 310. b. 20. E. 3. 20. a. 10. H. 6. 16. a. by Keble. Dy. 337, 338. 27. H. 8. 8. 5. Co. 103. resolved. 39. H. 6. 7. a. 11. 5. Co. 19. a. 11. Jac. Cro. 322. Moor, 260. 2 Rol. Ab. 148. 2. Bullf. 70. [Cro. Jac. 45. 3. Bac. Ab. 697.]

(115) **MOUNTAGUE** asked this question:—A man makes a lease for a term of years by indenture, and the lessor covenants and grants to the lessee, "that he shall have thorns for hedges growing upon the land, *by the assignment of the bailiff* of the lessor, and *necessary fuel* to burn in his house." First, Whether the lessee can take thorns without the assignment of the bailiff, or not? Secondly, If by the copulative (*and necessary fuel*), that shall refer to the assignment of the bailiff, or not? (116) For the first, it seemed to **BALDWIN** and **FITZHERBERT**, that the lessee, by virtue of his lease, may well cut thorns without assignment by the order of the law; for by our Books the law is, that a termor shall have loppings and shrowdings of trees for necessary fuel; and then to insert these words, "that he shall have fuel *by the assignment of his bailiff*," is void, for what the law gives him by implication in the lease, that he may take without assignment. For if I lease to one, two acres of meadow, and that it shall be lawful for the lessee to cut the grass *at the assignment of the lessor*, notwithstanding these words, the lessee may cut the grass. (117) But if the other covenant on his part in a negative, "that he will not take thorns without the assignment of the lessor," now that is a good covenant, and if he do contrary to that, action of covenant well lies. Or if it were a condition which is a negative in law, as, "proviso

A covenant by the lessor that the lessee "shall have hedgebote, by assignment of his bailiff," shall not restrain the tenant's legal right to take without assignment.

Secus, if the lessee had covenanted negatively, that he should not take without assignment.

5. Co. 24. b. Hob. 173. 11. H. 7. 8. b. 9. E. 4. 44. a. Cro. Jac. 481. Moor, 7. 23. 44. E. 3. 2. a. 40. Aff. 2. Co. Litt. 205. a. 10. H. 7. 2. 44. E. 3. 44. b. Dy. 36. a. 21. H. 6. 47. 72. H. 8. 1. 20. E. 4. 16. a. 4. Co. 73. b.

28. E. 3. 91. a. accord. by Thorpe, & 50. a.

[Sheph. Touch. 161.]

Ante, pl. 65. 28. E. 3. 96.

(115) 4. Co. 8. [80. b.] A covenant in law is restrained by express covenant, although it be in the affirmative, and 31. H. 8. 4. pl. 2. A reservation to the lessor excludes the generality of the law, and the heir shall not have the rent; and 52. pl. 3. Gift in tail reserving rent doth not exclude the tenure that the law would create. 11. Co. 62. b. 63.

(117) Mf. 40. & 41. El. in C. B. & *Francis Brown v. Henry Eyre*. The lord grants to a termor to take bote by the view of the keeper. **ANDERSON** holds, that this being in the affirmative shall not alter the law clearly, nor toll the liberty given to the termor by the law, but he may well take without view of the keeper; which **GLANVIL** agreed to, unless it be as 29. E. 3. 91. that it shall not be lawful to take unless by view of the keeper, &c.

"that he shall not take thorns without, &c." now if he do that, clearly the lessor may enter, &c. But in the other case, it is a grant on the part of the lessor in the affirmative. Wherefore, &c.—SHELLEY, *à contra*; for when a man takes a lease out of the order of the law, viz. by special words and terms, he shall have it as if the lessor spoke the words, and no otherwise. Wherefore here he hath accepted the lease by such words, "that he shall have thorns by the assignment of the bailiff;" that is as much as to say, he shall not have them without the assignment. Wherefore, &c. And as to the other point, it seemed to him that this copulative (*and*) should make the fuel pass by assignment, &c. *Quære bene casum.*

2. Co. 84. b.
Dy. 52. b.

Core's Case.

* [20. a.]
Debt lies against the administrator of one who gave a bill undertaking to lay out money in goods to be shipped for the plaintiffs, but who never executed his commission; though had the money been employed, debt would not lie.

3. Bulst. 256. Ben. 120.
1. H. 6. 8. a. 2. E. 3.
13. 40. E. 3. 50.

* (118) [IN the king's bench in error, the case was thus : That one *John Core*, grocer of *London*, brought an action of debt against the administrators of one *George Woddye*, and counts upon this bill : " Be it known to all men by these presents, that I *George Woddye*, of *London*, have received of *John Core* the sum of twenty pounds sterling; of which twenty pounds sterling, I, the forenamed *George*, to bear the adventure of the exchange to *Roan*, and there to bestow the said twenty pounds in French prunes, for the behoof and use of the said *John*, and to see them safely shipped, as I do my own wares; this done, the forenamed *John* to bear all manner of adventure, and charge from the quay of *Roan* in *France* to his own house in the city of *London*; in witness whereof, &c." with a seal. (119) And averred in the court, that *Woddys* had not bestowed the money in prunes; and upon this the defendants plead *plene administraverunt*, and found against them; and this matter alleged in arrest of judgment; and yet judgment given. And now there was error in this: That when the aforesaid *Core*, before the Justices of our Lord the King of the Bench, by his writ of debt required against the aforesaid defendants twenty pounds, and, in maintenance of his writ, declared on a bill made by the testator in his life-time, and in the aforesaid declaration shewn;

(119) In the argument of the case of *Breton v. Barnet*, M. 41. and 42. Eliz. [Ow. 86.] GLANVIL cited a judgment to have been given in *Harford*. *A.* gave money to *B.* to buy wares, *B.* did not buy them, and debt was maintained for the money.

by

by which bill it appeared evident, that by the law of the land a writ of account might have been brought and maintained against the aforesaid testator in his life-time, and not a writ of debt; nor can any writ of debt, by the law of the land, be maintained against the administrator; wherefore they pray judgment, and that the aforesaid judgment be revoked and annulled, &c.

(120) BAKER, *Attorney General*, thought that the judgment should be reversed, for no action of debt lies for this against the testator; for the bailment was to such intent, to have an encrease and profit of the money, and not the money back, for which money no action of debt lies, but an action of account; for the money was delivered to the intent of being employed and bestowed in prunes, and not to be preserved entire for the use of the bailor; for the law is taken in our Books to be, that if a man bail money to be bailed over, if it be not bailed according to the condition, no action of debt lies, but account, for he shall not receive the money to retain it; but now since he did not make the delivery over, he was accountable to the bailor. (121) And it resembles the case in 41. E. 3. 10. In account the defendant pleaded *unquies son receiver*, &c.; and found, that the money was bailed to the defendant upon condition, that if he made assurance to the plaintiff of certain land, then he should retain the money to his own use; and if not, that he should rebail, &c.: and found that he did not make the assurance, &c. wherefore judgment was given that he should recover. And there it is said that debt lies in that case, but it seems that it is not law. And although this receipt was testified by bill, yet it seems that it shall not alter the nature of the account in a debt: for it is only evidence, and should not estop the intestate from waging his law, as it seemed to him. (122) For it is as if a lease be made by indenture for a term of years rendering rent, although an action be usual upon such an indenture, yet the defendant may plead divers matters in fact, as a levy by distress or payment, for that the lease is the foundation of the action, and not the indenture; for if the indenture were the ground, then could he not aver such an

42. E. 3. 9. a.

6. E. 4. 11. Br. Debt.
6. 20. 36. H. 6. 9. 9.
N. B. 117. a. Dy. 22.
b. Lib. Int. fol. 159.
pl. 10. 1. E. 3. 2. a.
2. H. 4. 12. b. 20. H.
7. 9. a. 9. E. 4. 46. a.
39. H. 6. 44. b. 13.
H. 4. 9. a. 1. b. Hob.
36.
35. H. 8. 57. b. F. N.
B. 118, 9.

* [20. b.]

1. Roll. Ab. 116. 597.
6. Co. 44. b. 5. H. 7.
33. b. 4. 18. H. 6.
17. 17. a. 1. H. 7.
16. b. 4. b. 1. H. 3.
6. b. 9. E. 4. 25. b.
10. H. 7. 4.

(120) A. delivers an horse to B. and commands him to sell it for three pounds; and adjudged, that A. should not have debt for this three pounds, but account for the horse and the profits, which was T. 2. Jac. & Holcomb's Case v. Somerswood.

2 H. 6. 9. 9 E. 4.
50. b.

answer without deed, but the law is contrary. And in 1. H. 6. [7.] In account the defendant said, that for the receipt of the sum he made to the plaintiff a bill; judgment if, &c. And adjudged no plea, because it is only evidence of the account; &c. Yet peradventure if they were words obligatory to bind him to make an account of the said twenty pounds, or if he had not bestowed them according to the bailment, that then he acknowledged that he owed, or to pay, or that he was bound in the aforesaid twenty pounds, these words ought to charge him as debtor. (123) As the case is in 42. [E. 3. 9. a.] that a man by bill receives ten pounds to make a faithful account of it, these words make him debtor, &c. And although the testator cannot wage his law, yet it is not good ground to say that the administrator or executors shall be charged. As if a man before auditors is found in arrears, and dies, the executor is not chargeable; yet the testator could not wage his law. And for this reason here the administrator is not chargeable; but if the administrator were privy by any evidence to the receipt, perhaps he would be bound. (124) As the case is in 46. E. 3. [10. a.] that a man as receiver-general retains one in the service of his master, taking for his salary ten pounds *per annum*, by deed; in this case, although the master may wage his law, yet the receiver, who was made administrator, was charged in debt for the salary, inasmuch as he was privy to the retainer by his own testimony, by his bill: but here it is otherwise. Wherefore the administrator shall not be charged, for that the thing remained always in the nature of an account, of which no action lies against administrators. And for all these causes the judgment is erroneous, &c.

(125) MOUNTAGUE *to the contrary*. For I have learnt it for law, that if a man deliver money to be bailed over, if the bailee do not perform the condition, he is a debtor for the money, or accountable at the pleasure of the bailor: and that the case of 41. [E. 3. 10. a.] well proves. For when a man hath received money, and hath not employed and bestowed it

10. Co. 109. a. 11.
H. 4. 64. b. 91. b.
Br. Executor, 121. 11.
H. 6. 48. b. 4. H. 6.
17. b. 13. H. 7. 3. b.
43. 49. E. 3. 1. 3.
Fitz. Executor, 21. 14.
H. 4. 19. a.

1. Roll. Ab. 192.
Br. Adm. 13. *contra*.

[Co. Lit. 90. b. and
Mr. Hargrave's notes,
2, & 3. there.]

20. H. 6. 35. a. 19.
H. 6. 35. a. 20. H. 7.
9. a. 6. H. 4. 9. a.
2. H. 7. 8. 1. Bullt.
68. 9. Yelv. 24.

(125) E. 40. El. Rot. 1319. C. B. In debt by *Breton v. Barley*, defendant [Ow. 86.] plaintiff counts, that whereas the plaintiff had delivered to the defendant sixteen pounds to keep for the said Tb. and to the said Thomas, when he should be required, to re-deliver and pay; the defendant being often required, refused to pay; and upon demurrer by defendant, adjudged that debt lies, according to this case in Dyer.

according * to the trust and condition, he is a guardian of the same money to my use; as my debtor, if I will; for it is the more prejudice to me, if I make my election for my action of debt, inasmuch as I shall only recover the naked sum which was bailed; but if I bring account, I shall recover the increase and profits of the same sum, besides the sum: and when a man hath two actions given by the law, he may elect which he will. (126) As if I be disseised, I may have an affize, or I may have a writ of right, &c. And also there is a diversity in our Books, when a man delivers money to traffic with generally, merely to do the act of trading withal, and when the delivery is to do a single point in certain, as to lay out in prunes; for in the latter point if he lay it out in any other merchandize than is limited, he is a debtor, for that he did not follow his warrant. (127) And likewise here it is alleged by matter of fact, that the money was not laid out in prunes; and by the demurrer in law acknowledged by the party. Wherefore, &c. And to that which is said, that this bill does not make the intestate a debtor, because there are wanting words obligatory, he clearly thought that the words *I have received twenty pounds, or I owe, or am bound in, or if a man recite that Whereas he had one hundred pounds of money of I. S. he hath paid him forty pounds, and so there remains sixty pounds,* this is a good obligation, and shall bind the executor; for every word which proves a man to be a debtor, or to have the money of any stranger in his custody, clearly, if it be by bill, shall make his executors debtors also. (128) As if a bill be made that *witneseth that I have found twenty pounds of I. S. without other words.* I shall be charged, and shall be ousted of my law; for in our Books, in a stranger case, it is adjudged, That a man shall be ousted of his law, and the executor shall be bound. As if I bail a charter to one by indenture, the bailee dies; action of detinue lies against his executors, by reason of this indenture, &c. So in every receipt are included two things, viz. Whether the receipt be to the use of a bailor or a stranger, or to the use of himself. If to the use of a stranger, then is he his debtor, because the property is not in himself, &c. And here it is acknowledged by the bill, that the receipt was to the use of the plaintiff. He thought also, for another reason, that the judgment

9. H. 5. 3. a. 3. E. 3.
5. 7. H. 6. 5. a. 2.
R. 3. 14. a. 4. Co. 94.
F. Account, 47. 27.
H. 8. 25. a. 2. H. 7.
11. a.

Dy. 25. pl. 77. f. 21. 30

22. E. 4. 22. a. 24.
R. 5. F. Debt, 166. 11.
H. 6. 39. Dy. 22. b.
27. H. 8. 22. a.

1. Bull. 68, 9.

2. E. 4. 1. 4. 4.

Dy. 51. a. 13. H. 4. 13.

[3. Leon. 38.]

28. E. 3. 98. b.
7. H. 6. 6.
Cro. 69. a.
11. H. 6. 39.
Dy. 37. a.

20. H. 6. 35. 1. E. 3.
2. a.
18. E. 4. 23. b.
4. Rol. Abr. 116.

Finch, 9. a.

4. Co. 17.
Fulb. 138. b. 1. Rol.
Ab. 606. 6. E. 4.
11. b. Fitz. 138. a.

* [22. b.]

firmed. In the first place, admit that he had no bill evidencing the receipt, yet in the common opinion of the Books, it is in the election of the bailor to have an action of debt or account in such case. (135) As in 41. and 42. E. 3. [10. a. pl. 5. 9. a. pl. 7.] it is ruled, that if a man bail money to one upon a condition, that if the bailee make him assurance of certain land before such a day, that he shall retain the money for ever; if not, to re-deliver it to the bailor; if the bailee do not perform this trust and condition, he is accountable for the sum, or debtor to the bailor at his pleasure. The same is the law if money be delivered to traffic with, or to be bailed over, if the bailee break his trust, the one action or the other lies for the bailor. So it is if I bail ten pounds to you to give away in alms for me, now you are accountable to me; for the property always rests in me until the alms be performed, and I may countermand the doing of that, and if you retain the ten pounds in your hands afterwards, I shall have a good action of debt against you for it. And FITZ-JAMES thought in the case here, that the property of the twenty pounds was in the bailee, because he had liberty by the bailment to make an exchange of the twenty pounds; yet he had it not so far, but that the property vests back in the bailor, if the trust be not observed, as is acknowledged by the defendant, by the trial, and also by the demurrer in law.

(136, * 137) And besides, if I bail twenty pounds to one to keep for my use, if the twenty pounds were not contained in

(135) 28. E. 3. 98. Fitz. Debt, 146. In debt the deed was, "*noverint universi me teneri et firmiter, &c.*" and afterwards "*ad fidelem compos' de profic' reddend'*"; and adjudged that it is at the election of the plaintiff to have the one or the other.

(137) 43. Eliz. C. B. *Hall v. Wood*. [Owen, 131. Cro. Eliz. 841.] Action upon the case for trover and conversion of forty pounds, without shewing that it was in bags, and the plaintiff had judgment, and 41. Eliz. in B. R. *Holloway v. Higgs*, there cited, [Cro. El. 819.] the master delivers corn to his servant to sell, the servant sells it, and converts it to his own use, and the master brings an action of trover, and had judgment. H. 37. El. B. R. Rot. 614. [Moor, 394. Cro. Eliz. 457.] Error by *Banks v. Whetston*. The master of the hospital of *Neculin* delivered four pounds to *Banks*, to deliver it to *Whetston*, being almoner there; and for this *Whetston* brought detinue in the court of *Wallingford*, and had judgment to recover; and *Banks* brought error, and assigned error in point of judgment; and it was argued by LEA, and he cited a case to have been adjudged 28. Eliz. that a man delivers twenty quarters of barley, to be delivered to him back in malt at such a day, and for the malt he brought detinue, and adjudged maintainable (and the Court thought that there was such a case, but rather that it was debt in the *detinet*); and upon the usual reason, that one penny cannot be known from another in any bag, they were of opinion that detinue does not lie, and therefore they reversed the judgment.

T. 30. Eliz. Rot. 37. B. R. *Spurr v. Wood*, Be it known that I owe to *I. Spurr* fourteen pounds, besides six pounds by bill, adjudged a good obligation for all.

H. 36. Eliz. Memorandum that I owe (without naming any one) ten pounds to be paid at *Michaelmas*, and subscribing his name *I. S.* is a good obligation.

A bond made in the name of a third person is good. 2. 4. 8. E. 4. 10. [2.] 2. 5. Co. Litt. 229.

a bag,

a bag, coffer, or box, an action of detinue doth not lie, because the twenty pounds could not be discovered or known to be mine, but debt and account lie at my pleasure there. So if I bail to one certain plate to keep for me, if he change the plate, I shall have an action upon the case, or detinue, at my election, in the time of E. 4. [18. E. 4. 23. a.] (138) So by FITZJAMES, in the time of H. 7. [20. H. 7. 8. b.] FROWICKE, being *Chief Justice*, this case was argued and ruled: A man bought twenty quarters of barley, to be delivered at a certain place, on a certain day; the vendor did not perform his contract, by which the vendee was driven to buy barley for his business, being a brewer, at a much greater price, &c.; the vendee upon this matter was permitted to bring an action upon the case, and adjudged maintainable: and so he might well have had an action of debt for the barley, but not detinue, for the property of the barley could not be known, for one quarter cannot be known from another quarter, &c. Then it is to be considered to what effect this bill is, whether it be a sufficient obligation to charge executors. (139) And it seemed to them all that it shall be: for if a man make such a bill, viz. "*This bill witnesseth that I A. B. have borrowed ten pounds of C. D.*" without more, this shall charge the executors, as well as a bond, and the testator should never wage his law against this bill. The law is the same, *Memorandum, that such a one owes to B. ten pounds*, without more, if this bill be sealed, and delivered as a deed, it is a bond good enough. So, *Memorandum, all things reckoned and accounted between A. and B. A. acknowledged to owe B. ten pounds*; this is an obligation sufficient in law to charge A. (140) And PORTMAN said, that it was ruled lately by the Judges, if these words *in cuius rei testimonium* be wanting, if the deed be sealed, that is well enough; for however these words *teneri et firmiter obligari* are generally put in every common bond, yet when other words which purport the same effect and the same sense are expressed in writing, the law shall construe them to have like efficacy. And so the deed of every man shall be taken most strongly against the maker: as if lease for term of life, reversion to a stranger, the law shall say that this remains to the stranger: so it is if a man make a lease for life, rendering rent, upon condition that if the rent be arrear, then the land shall revert to the lessor, that shall

2. H. 7. 6. 18. H. 6.
20. b. 2. R. 3. 15. a.
7. H. 4. 13. b.

3. Cro. 781.
Cro. 69. a. 77. a. 11.
H. 7. 5. b. Davis, 27.
3. Keble, 767.
4. Co. 94. a.

[Hen. Bl. 551.]

Dy. 24. a.

Went. 167.

2. 22. E. 4. 20. 22. a.
19. R. 2. Debt, 166.
Cro. 34. b. 8. E. 4.
5. a. 2. H. 4. 9. 37.
H. 6. 9. 40. E. 3. 1. a.
2. E. 4. 14. a. 11.
H. 6. 39. a. 38. H. 6.
30.

[Wentw. Exec. 117.]
Supra, 19. a. 2. Co. 5.
Cro. 41. b. 17. E. 3.
32. a. Perk. § 128.
7. H. 7. 14. b. *contra*.
[Cro. Jac. 420. Mo. 3.]
Went. 168.

Plow. 134. a. 1. H. 5.
8. b. 21. H. 7. 37.
27. H. 8. 15. Plow.
29. Bro. Rent, 1. 19.
7. Co. 24. a. 52.
20. H. 7. 11. a. Plow.
157. b. 8. Aff. 34. 13.
Mar. 125. b. 2. H. 6.
4. b. Plow. 170. 542.
21. H. 6. 11. L. 11.
§ 224.

shall be taken a re-entry. (141) So it is if I grant to you to distrain for ten shillings annually on my land, this is a rent charge of ten shillings; and so it is * if I make a feoffment in fee, by deed indented, rendering ten shillings at such a Feast for the space of twenty years, I shall have a good action of debt for this rent, by SPILMAN. So upon a question of tithes, a parson grants an annuity to another, and for default of payment at the day that he shall forfeit by way of penalty forty shillings; here are not words obligatory *vi termini*, and yet no one will deny but an action of debt well lies, for that it amounts to an obligation; for all these words which prove by specialty that the maker is debtor to another, are sufficient obligation. (142) And although the executors are not expressed in an obligation, yet the law shall charge them, because they represent the estate of the testator. The law is the same of administrators; but the heir shall never be charged without express mention of heir. Therefore, inasmuch as this bill is evidence of the receipt of the twenty pounds by *Weddye* to the behoof and use of *Core*, and he hath not employed them accordingly, it is as strong as if he had been bound by words obligatory. (143) Also it is a common maxim, that against a specialty no man shall wage his law. So in 16. E. 3. [Fitz. Ab. *Ley*, 57.] In account the plaintiff counted upon a bill witnessing the receipt by the hands of the plaintiff; the defendant wished to tender his law, and might not, because that the writing evidenced the receipt. But there is one Book [Fitz. Ab. *Dett*, 4.] which says, that a man may wage his law against a tally sealed, if the tally have only notches, or scotches indented, every scotch for twelve-pence, according to the common usage; but if the sum be written upon the tally ensealed, he shall be ousted of his law. (144) And besides, it is common doctrine, that no action lies against executors where the testator could have his law, but here he could not. So if a man be retained in service for twenty shillings *per annum*; if the salary be arrear, and the master die, his executor shall

Plow. 26. a. 272. b.
4. Co. 9. 49. b.

6. H. 227. b. 43. E. 3.
9. b. F. N. B. 120. M.
Dy. 24. 6.

3. Cro. 232.
1. Sid. 24.
[3. Burr. 1383. a.
Vern. 322.]
Supra, 14. a. 2. H. 4.
13. a. Plow. 457. a.
Bro. Covenant, 11. 28.

2. H. 6. 8. a.
10. E. 4. 8. a.
[5. Bac. Ab. 429.]
F. N. B. 122. 1. 21.
H. 6. 30. Fulb. 122.
a. 1. Inf. 229. a.
209. 295. Fitz. *Ley*,
60.
Went. 174.

[Cro. El. 600. Cowp.
375.]

27. H. 8. 23. a.

(141) 7. H. 6. 19. Debt, 28. If annuity be granted in fee, and twenty pounds by way of penalty, he shall have debt upon the penalty, and yet the annuity continues. Adjudged.
(143) 4. E. 1. Fitz. *Ley*, 68. Debt upon a tally sealed; defendant tenders his law; and it was not received, for that it had his seal depending.

12. H. 4. 24. a. F. N. B. 122. 1. That he can plead nothing due, or wage his law against it, for a bond ought to be made in parchment or paper. And 14. E. 2. Fitz. *Ley*, 70. Defendant was admitted to his law, in debt brought by an executor upon a tally, for that the writing of the tally may be out, and the notches may have been diminished at the will of any man.

be charged. So is the law with regard to the executor of one who has been boarded at the table of another, because the testator, by FITZJAMES, in these cases, could not wage his law: so is the law for arrearages of an account, or years. (145) And so it shall be reasonable that the action lies, or otherwise plaintiff will be without remedy, and defendant might retain the twenty pounds in his hands, which would be unreasonable. For it is clear law, that no action of account lies against an executor or administrator, for the law does not intend them to have been privy to the account; (a) wherefore it seemed that the judgment was good, and affirmable, and so it was adjudged. *Quod nota.* And MAY had an injunction in the chancery for this matter. And there judgment was given for *Care*. Also, *relefs*—four pounds damages and costs.

(a) But now by 4. & 5. Ann. c. 16. § 27. "An action of account lies against the executors or administrators of every guar-

"dian, bailiff, or receiver." And before that statute the King by his prerogative might have account against them, see 11. Co. 90. a.

4. H. 6. 19. b. 23.
H. 6. 48. b. 38. H. 6.
6. a. 4. b. 8. E. 4.
23. b. 16. E. 4. 10. b.
1. E. 4. 5. b. 39. H. 6.
18. 9. E. 4. 1. 15.
E. 4. 16. a. 22. 28.
H. 6. 13. 4. b. Dy.
20. b. 9. Co. 87. b.
Fitz. Executor, 21.
19. H. 6. 16. a.
Litt. 28. a. 48. E. 3.
2. a. 2. H. 4. 13. b.
Litt. 124. F. N. B.
117. C. Plow. § 20.
19. H. 6. 5. a. 4. E. 4.
15. 23. Cro. 186. a.

* Michaelmas Term,

28. Hen. 8.

* [23. b.]

(146) **K**NIGHTLEY asked this question: If two executors have a term, and one grants to a stranger all that belongs to him, how much of the term shall pass? And THE COURT thought, that all the whole term passed,

If two executors have a term, and one grant all that belongs to him, the whole term passes; *as of joint-tenants.*

(146) 4. H. 7. 4. b. Release of a debt by one executor is good against all. 21. H. 7. 15. b. Surrender of a term by one executor is good for all. 28. H. 6. 3. If one confess the action, judgment shall be given against all. [But see 1. Str. 20.] 17. E. 3. 66. Fitz. Executor, 89. 32. E. 3. Fitz. *quid juris clamat*, 5. That the attornment of one shall be the attornment of the other. 24. E. 3. 31. Fitz. *Affize*, 130. Dyer, 187. b. One executor gets possession of the goods, and pays debts with his own money, as far as the amount of them, this is a conversion of the goods of the testator to his own use, and justifiable by this executor against the other surviving executor. [Ante, 2. a.] The law is the same if an executor dispose of money in pious uses for the soul of the testator. Fitz. Executor, 91. One executor shall not have account against his co-executor. There seems a difference that executors cannot make partition between themselves of the goods of the testator, for there is no moiety between them. 27. H. 8. 22. East. 1. Car. B. R. *Argol and Cbeymie's case*. [Palm. 405. Latch. 82.] T. 38. Eliz. *Kelfet v. Nicholson*. [Cro. Eliz. 478. 496.] A. and K. executors of B. and A. gave by parol an obligation made to the testator to D. in satisfaction of a debt which she herself owed to D. A. died, and K. brings detinue, and adjudged that it does not lie, as it was like a *chife in action*, and the donor has property in the obligation, as if the executor had given goods, and such gift binds the other executor, and so adjudged. M. 38. & 39. Eliz. in B. R. If one executor waste the goods of the testator, that does not make the other liable *de bonis propriis* upon a *devastavit*. Lib. Int. 327.

Keil.

inasmuch

Bro. Executors, 130. 16. H. 7. 4. 24. E. 3. 21. Dyer, 319. 39. E. 3. 35. 6. H. 4. 3. Cro. 23. a. 9. 21. E. 4. 12. 25. Dyer, 312. b. Went. 142. 3. Cro. 318. 347. 21. H. 7. 25. b. [1. Atk. 460. 1. Salk. 318. 2. Br. Caf. Ch. 114. 324.]

Keil. 23. 11. H. 6. 38. Post. 210. The writ is awarded against the waster only. B. 4. H. 8. Rot. 303. T. 34. Eliz. C. B. between *Walton and Sutton*. And E. 36. Eliz. between *Hankford and Metford*. [Godol. Orph. Leg. 205.] T. 38. Eliz. B. R. between *Keslake and Nicholson*, it was adjudged good, where two executors were possessed of a bond, and one of them gave it to a stranger, and died, the other surviving, this grant is good as to the parchment and wax, but not for the debt. [Ante, §. b. in marg.]

In trespass *quare clausum fregit*, if defendant plead that the *locus in quo* is six acres in *D. which are his freehold*, without giving a name certain to them; and plaintiff reply *his freehold*; though each have six acres there, defendant cannot give in evidence that he did the trespass in his own soil.

Yelv. 166. Dyer, 183.

5. 9. H. 7. 20. b. 7. a.

1. E. 5. 4. b. 27. H. 8.

7. a. Cro. Jac. 594.

§91. 1. Cro. 514.

§. Cro. 897.

[2. Black. Rep. 1089.

Bull. Ni. P. 92. 5. Bac.

Ab. 213.]

(147) **N**OTE, It was holden clearly by all the Court, and by BAKER, *Attorney General*, in trespass for breaking a close, if the defendant plead that the place where the trespass is supposed to have been done is six acres of land in *D. which are his freehold*, and the plaintiff reply, *that they are his freehold*, and not the freehold of the defendant; if the defendant have six acres in *D.* and the plaintiff other six acres, the defendant cannot give in evidence that he did the trespass in his own land; but by his plea it shall be intended, that his meaning relates to the six acres of the plaintiff, and not to his own six acres; because, until he gives a name to the place where the trespass was done, there is no necessity for the plaintiff to allege a new assignment, inasmuch as the defendant hath not varied from the meaning of the plaintiff, if he give not a name certain to the six acres, as to say that "*the place &c. is six acres in D. called Greenmead, &c.*" *Quod nota.*

Before the statute of uses, if a man made a feoffment of his wife's land to his own use in fee, and left it by will to her for life, after the statute whether the feoffee should be remitted?

Dyer, 54. 106. 51. Pl.

111. a. 2. El. 191. b.

Hob. 255, 256. Dyer,

77. b. That the sta-

tute 27. H. 8. c. 10.

does not make remitter.

B. N. C. 119. 251.

Plow. 114. Dyer, 329.

b. 129. a. 330. a.

Bro. Remitter, 49.

Bro. Parliament, 73.

(148) **M**OUNTAGUE put this case: Before the statute of extinguishing of uses [27. H. 8. c. 10.] a man was seised of land in right of his wife, and made a feoffment in fee to his own use, and declared his will, that the feoffees should stand seised to the use of his wife for the term of her life; now comes the statute, and says, that *cestuy que use* shall be deemed in possession as to that which he had the use of: Whether by this statute shall the wife be adjudged in by remitter, or not?—SHELLEY thought she should, because she does not come to it by her own act, but by the act of the law; as if a remainder or descent had fallen upon her; and also there is no one against whom she may bring her *cui in vita, &c.*—BALDWIN and KNIGHT-

LEV, *à contra*, inasmuch as she comes to it by her act, s. by act of parliament, to which every one is a party, &c. And also the statute says, That *cessuy que use* shall be adjudged in, in such state * as he had the use: for if tenant in tail make a feoffment in fee to his own use in fee, or in tail, the issue is not remitted, for he shall have a fee simple in the use, &c. *Ideo quare.*

1. Inst. 348. b. 21.
H. 7. 4. a. 2. Co. 46.
b. 1. Co. 48. b. 34.
H. 8. 54. a. 14. H. 8.
5. a. 5. Eliz. 221. a.
Plow. 207. a.
[3. P. W. 461. and
the cases cited in Plow.
111. &c. Edit. 1761.]

(149). **A**N Abbot, with the assent of his convent, grants, for them and their successors, *to a man and his heirs*, to find one of his monks, to chant mass, and matins, and vespers *every holiday*, in such a chapel; and grants further, that as often as there shall be default in any, &c. they shall forfeit *to him and his heirs five pounds*. The question was asked by WILLOUGHBY, Whether the heir shall have an action of debt for that five pounds forfeit, or writ of annuity? And the Court thought, that annuity does not lie in this case, inasmuch as it is not annual; and yet, perhaps, a man shall have a writ of annuity for rent granted every second or third year, &c. But in this case it may be the Abbot, &c. will never fail of the service, &c. And SHELLEY said, That although the heir hath inheritance in the five pounds, inasmuch as it is a penalty which follows the land, as the case of covenant is in *M. 42. E. 3. [3. a.]* yet he shall have no other action but debt: for it has been seen in the Books, that executors have maintained debt for a relief. (150) But FITZHERBERT denied that the law was so; for, for the arrears incurred in the life of the lord, his executors shall not have action of debt, &c. But if the testator has no estate but for term of life, or years, they shall have debt, as in *19. H. 6. [41, 42.]*—ENGLEFIELD said, that for a similar matter he brought attachment of debt, as heir to his ancestor, against an Abbot, when he was serjeant, and upon that there was a demurrer in law; and all the Judges acknowledged the matter; and he said, that the Abbot agreed with him: but there he said that FITZHERBERT held an opinion contrary to law, in that he said, A serjeant

Annuity does not lie by the heir to recover a penalty forfeited by neglecting to find a monk to serve the plaintiff's chapel *every holiday* pursuant to the grant of defendant, but debt only lies.

Ante, 23. a. 7. H. 6.
19. F. N. B. 120. M.
4. H. 6. 31. a. 14.
E. 4. 4. a. 11. H. 4.
8. b. 85. a. 20. H. 7.
1. a. 8. H. 6. 7. a.
[Co. Litt. 83. a. b.
162. b.]
Bro. Debt, 66. a.
H. 4. 6. 11. H. 6. 11.
Fitz. Covenant, 7. F.
N. B. 181. N. 4. Co.
49. b. B. N. C. 179.
Fitz. Avowry, 233.
11. H. 6. 15. a. 4.
Mar. 140. a. 20. H. 7.
1. b. 40. E. 3. 4.
7. H. 6. 13. a. Bro.
Relief, 11. [Co. Litt.
47. b.]

By the statute of 32.
H. 8. c. 37.

(150) E. 31. Eliz. If an attorney of the court be sued as heir or executor, it shall be by bill, and not by writ, by PERIAM and WYNDHAM. [But settled *contra* at this day, 1. Lord Raym. 533. 1. Salk. 7. pl. 18. 2. Lord Raym. 1398.]

[Cro. Car. 84. Barnes,
371. 2. Mod. 296.

4. Com. Dig. 184.
Str. 738.]
11. E. 4. 2. b. 3. a.

cannot have writ of privilege, as heir to any ancestor. But FITZHERBERT said expressly, That that was then his opinion, and still is, &c. *Quare inde.*

A lease "for three years, "and those ended for "other three years, and "those ended for three "years more, during all "the life of the lessor," is a lease for nine years only. *Socus*, perhaps, had it been from three years to three years, during the life, &c. *with livery.*

6. Co. 35. b. B. N. C. 112. 14. H. 8. 10. b. 1. Rol. 850. 857. Plo. 273. b. 522. b. 1. Rol. Rep. 287. 1. Bulst. 190. 158. 3. Bulst. 158. 14. H. 8. 12. b. 14. b. [3. Bac. Ab. 432. &c. 3. Term Rep. 462.] 15. H. 7. 8. a. 11. H. 6. 4. a. By this it is proved that it lies in livery.

* [24. b.]

Sture against Fenhell'.

If in a formedon the tenant and vouchee both make default after the *summ. ad warr.* is returned served, the demandant shall have a *petit cape* against the tenant, though he hath no remedy over against the vouchee.

25. Aff. 15. 45. E. 3. 25. 44. E. 3. 45. b. 39. E. 3. 28. a. Cro. Jac. 293. 1. Inst. 107. b. 45. E. 3. 19. b. 5. H. 7. 38. b. 22. Aff. 79. 12. H. 6. 6. b. 5. H. 7. 39. 49. 1. E. 5. 3. 4. [Booth's real A&C. lib. 2. cap. 17. & 20. And see W. Jon. 412.]

(152) IN a formedon by *Sture v. Fenhell'*, he vouched to warranty, and the summons was returned served, and the vouchee is effoined, and day given to the demandant, and tenant; at which day the tenant, and likewise the vouchee, made default; upon which it was a doubt among the Prothonotaries what process should issue: and all the Judges were asked of this; and their opinion was, that clearly the demandant may have a *petit cape* of the land against the tenant, inasmuch as the vouchee never entered into the warranty; and the tenant was not out of court, because he is obliged to be ready in court to answer to what shall be objected in bar to the warranty; as if the vouchee demand the lien to warranty, the tenant must shew the lien, &c. And also they said, that the tenant has no remedy over against the vouchee, because he does not attend the suit of the voucher: *Ideo sol' ejus non defluet, qd' ENGLEP.*

Sir John Danvers Knt. and Others, *against* the Bishop of Worcester and the Warden and Scholars of Merton College, Oxford.

(153) NOTE, *Michaelmas*, 1. H. 8. Rot. 537. *John Danvers, Knight*, and others, brought a *quare impedit* against the bishop of *Worcester*, and the warden and scholars of *Merton College* in *Oxford*; and declared that a predecessor of the warden was seised in right of the college of six acres of land, to which the advowson was appendant in fee, and presented; and afterwards one *William Catesby* was seised of the six acres, to which, &c. in fee, and died so seised; after whose death it descended to *G.* as son and heir; and afterwards the father was attainted of high treason by the parliament holden in the 1st year of *Henry 7th*, wherefore the king then seised the said acres; and he being so seised thereof, the said church became void, whereupon the predecessor of the defendant presented by usurpation upon the king, &c. and afterwards in the 11th year of *Hen. 7.* the said act of attainder was annulled, and *G.* the son restored, whereupon he entered into the six acres, and was seised in fee, and enfeoffed the plaintiffs; and now the church is void, and it belongs to them to present. Whereupon the defendants demurred in law; and adjudged against the plaintiffs; and a writ to the bishop awarded for the defendants, without making title, &c.

(153) Trin. 7. Jac. B. R. Rot. 5. At *Portsmouth*, \clubsuit *William* the son of *Anfus* comes and says, that he claims nothing in the last presentation to the church of *Newton*, nor will disturb it; wherefore it is commanded to the bishop, that he admit a parson to that church, upon the presentation of *Richard de Newton*. Out of Mr. Noy's Book.

Brikhed *against* Wilfon.

(154) SEE Trin. 12. H. 8. Rot. 542. One *Brikhed* brought an action of debt against *Wilfon* for forty quarters of malt, and declared upon two bills obligatory, by which the defendant "acknowledged himself to owe to "the said plaintiff twenty quarters of good and proper malt, "to be delivered on such a day in London, in an house, &c. "and if he failed at the day, * that then he should lose and "forfeit forty quarters;" and the plaintiff averred, that he did not deliver the twenty quarters at the day, &c. by reason

In *quare impedit*, if the defendant have judgment upon a demurrer to the declaration, he shall have a writ to the bishop without making any title.

[3. Mod. Ent. 174. Hob. 163. Vaugh. 6, 7. 58.]
2. Rol. Ab. 371. 5. 387. 31. 5. H. 7. 36. b. Remitter to the advowson before that he had the manor. 2. H. 7. 17. b. 3. H. 7. 6. b. 1. Rol. Ab. 231. 18. 18. Ed. 3. 52. 39. E. 3. 36. b.

18. El. 351. a. 2. Aff. 9. 4. H. 7. 11. b. 10. Eliz. 266. b. 1. E. 3. 17. a. Diet. 123. b. 6. Co. 50. 1. H. 7. 13. b. 19. H. 6. 4. b. 20. E. 4. 14. a. 11. H. 6. 2. a. 33. M. 6. 55. N. R. 33. a. 34.

To an action of debt for twenty quarters of malt, tender and refusal is a bad plea, without saying *uncore grist*.

Dyer, 300. 32. H. 6. 2. 7. E. 4. 3. a. 8. E. 4. 14. 4. Mar. 150. a. Perk. pl. 785. 6. E. 4. 11. b. 19. H. 8. 12. a. * [25. a.]
49. E. 3. 9. a. 14. H. 6. 23. a. 20. E. 4. 1.

whereof

whereof an action accrued, &c. And the defendant pleaded a tender at the day and place afore said, of the twenty good and sufficient quarters, and that the plaintiff then and there refused to receive them, and this, &c. Upon which the plaintiff demurred; and adjudged for the plaintiff, and he remitted twenty quarters, &c. for he ought to have said that he was still ready to deliver the twenty quarters, &c. (a)

(a) Wherever a debt or duty is discharged by a tender and refusal, the defendant needs not plead *uncore prist*; but where it is not actually discharged, the plea is bad without it. But Lord Coke, 1. Inst. 207. a. and 7. Rep. 79. agreeing with this general

doctrine, has however particularly excepted the case of *corn*, as being *bona peritura*, and a charge to the obligor to keep it; which reasoning seems applicable to the present case of malt, and is against Dyer.

Hilary Term,

28. Hen. 8.

If the first juror be sworn, and the rest challenged, he shall choose a companion to try the polls with himself.

The Court will not award process into the next hundred upon the suggestion of counsel that there are not sufficient freeholders in the hundred, but that must be returned by the sheriff.

[Co. Lit. 158. a. 2. H. H. P. C. 275.]

(156) NOTE, A juror was sworn upon the principal, and then the defendant challenged all peravall; and the order of the Court was, that he who was sworn should choose to him a companion to try the polls, &c. And in that matter the inquest was stayed for default of hundredors. And the counsel for the plaintiff made a suggestion to the Court, that there were no freeholders within the same hundred, but all copyholders, and ancient demesne, wherefore he prayed the process from the next adjacent hundred; and could not have it, but the Court ought to be certified by the return of the sheriff (a).

7. H. 4. 1. 12. H. 6. 1. 3. H. 7. 5. Abridgment de Ass. Challenge, fol. 50. 19. H. 6. 48. b. 38. E. 3. 25. a. 29. E. 3. 19. a. Plo. 73. a. 74. 10. H. 6. 19. a. F. N. B. 142. 13. H. 7. 13. b. 11. 6. 27. 22. E. 4. 3. a. 45. Ass. 1.

(a) After several variations in the number of the hundredors necessary to serve on juries, in the reigns of Ed. 3. Hen. 8. and Queen Eliz. the statutes of 4. & 5. Ann. c. 16. § 6. and 24. Geo. 2. c. 18. § 3. have abolished them altogether in actions or suits in the king's courts of record at *Westminster*, and in actions or informations on penal statutes, enacting that the *venire* shall come

de corpore comitatús. But in appeals of felony or murder, or indictments or presentments of treason, or felony, or murder, or other matters, hundredors are still in strictness necessary. But Lord Hale, 2. H. H. P. C. 272. says, that he never knew any challenge for default of hundredors upon a trial of an indictment for felony or treason.

(157) A MAN was arrested by the sheriff upon a *capias*, and found sureties for his appearance at the day in bank, according to the statute [23. H. 6. c. 10.], and then came a *superfedeas* to the sheriff: Whether it were necessary for the defendant to appear, or not, or that the surety were discharged by the (a) *superfedeas*? was the question. And it seems by the opinion of the Court, that he ought to appear to save his bond, &c.

The defendant must appear to save his bail below, notwithstanding a *superfedeas*.
 Sheriffs, 25. 23. H. 6. 10. 4. E. 4. 21. a. Perk. pl. 147. 21. H. 26. 1. 2. H. 7. 1. b. 19. a. 1. E. 5. 1. a. Bend. 7.
 [5. Burr. 2683.]

(a) This *superfedeas* must be understood of the arrest only: for if it went to the action, the parties would be out of court, and the condition of the bond impossible by the act of the law, and so the obligation saved. Co. Litt. 206.

(158) A MAN possessed of a term devises by his will the term to his two sons I. and T. *equally*. Whether a devise of a term to two *equally* makes a joint-tenancy,

(158) Bendloe, 5. a. [fol. 36. pl. 63.] The opinion of MOUNTAGUE, Chief Justice. If a man devise his land to his two sons, *equally to be divided between them*, they are joint-tenants till division, for those words *to be, &c.* are words of the future tense. 6. E. 6.

M. 14. & 15. Eliz. A. devises land to his son and his daughter, and to the heirs of *either of their bodies begotten*, and in default of issue of his son and daughter, remainder to the right heirs of the devisor: the son dies without issue; the daughter has issue and dies: Whether the heir of the devisor may enter into the moiety of which there was a several inheritance to the son? or shall that moiety, by the intention of the devisor, go as a remainder to the heir of the body of the daughter? MANWOOD and DYER agreed upon the words "*either of their bodies*." But HARPER and MONSON thought that the entry of the heir of the devisor is good. T. 37. Eliz. B. R. *¶ Dickens and Northcote's case*. There the Judges were divided, but afterwards one of the Judges changed his opinion, and adjudged them tenants in common. 37. & 38. Eliz. C. B. *Lowen and Dodd's case* [Cro. Eliz. 443.] entered East. 37. Rot. 2300. A man devises land to his two daughters and their heirs *equally*—no judgment; two Judges against two. But afterwards, 41. & 42. Eliz. *Lowen and Cock's case*, [Cro. Eliz. 695.] on the same title adjudged tenants in common; but there resolved, if the word *equally* had not been in, they would have been joint-tenants; where POPHAM, Chief Justice, put a case, 38. Eliz. devise of a term to two *equally*, they are tenants in common; but if a man devise land to two *equally*, they are joint-tenants (a); for it appears by the word "*equally*," that the intent of the devisor was, that they should have equality of property in them; but in case of a term, if they should be joint-tenants, then if one died in the term, the survivor should have the whole property, and then the deceased loses so much of the profit of the term as is to come by his death, which would be inequality of property; but in case of land there is no inequality, that both should have jointly for their lives, and equal possibility of inheritance, and there the book 30. H. 8. Bro. *Devise* 29. was denied to be law. 18. Eliz. Cur Ward', *Shepherd's case*, devise of land to two, and their daughters, to have to theme *qually for the term of their lives* (b), *per reason del reverse ad eigne*. Protboron, Reader of the Inner Temple, 1614. 21. Jac. A. devises lands to his sons B. and C. *equally*. He held, 1st, That they have inheritances (c). 2dly, That they shall take jointly, and *equally*, is void; for the law parting it, they have equal estates for life, and equal possibility of inheritance.

(b) *Shepherd's case* is here by some mistake intelligible, but as cited in Lowen and Dodd, Cro. Eliz. 444. is thus: "I will that my lands called Earth-pits shall equally remain to Joan and Mary my two daughters, and the heirs of their two bodies:" "And held a tenancy in com-

"mon, and that the surviving daughter should not have her sister's part for her life."

(c) See Cowp. 352. but Cro. Eliz. 330. and Cowp. 657. *contra*.

or a tenancy in common? Whether they be joint-tenants, or tenants in common? *was*

Mo. 594. 667. 1. Le- the question (a).
mo. 113. 3. Leon. 19.

Bro. Devise, 29. 3. Co. 39. b. 16. Eliz. 333. b. 1. Bulst. 113. 2. Rol. Ab. 89. 1. Cro. 75.
Bendl. 18. 9.

(a) A devise of lands to two *equally* always creates a tenancy in common, 1. Willf. 165. Cowp. 66c. *equally* as well as *equally to be divided*, implying division; whereas if they were to take as joint-tenants,

there would be no division. And *equally to be divided* has been determined, 1. Willf. 341. to give a tenancy in common in a deed.

* [25. b.]

A man shall be tenant by the curtesy if the issue be born alive, though it have never been heard to cry.

Bendl. 21. } S. C.

1. And. 35. } S. C.

Fitz. 7. b. Perk. pl.

471. 8. Co. 35. a. 3. Cro. 696. Co. Litt. 29. b.

(159) **I**T was moved, That a man shall be tenant by the curtesy, although the issue be not heard to cry, so as it can be known that it hath * life (a); for it may be the issue is born dumb. So was the opinion of FITZ-HERBERT (b).

(a) I have here followed the oldest edit. (1592.) that I have been able to procure, the words of which are *issint que il poit sciri que il ad vite*: in that of 1621 it runs thus, *issint que il poit scirre et ad vite*, which the edit. of 1688 follows. The edit. of 1672 has *issint que il poit scire et ad vite*, this last, however, undoubtedly misprinted for *scirre*.

(b) But by the law of Scotland it seems that curiality or curtesy only takes place where the issue has been heard to cry. Lord Stair, in his *Institut. Lib. 2. Tit. 6. fol. 291. edit. 1759.* (a book of the first authority), lays it down, that "the children of the marriage must attain that maturity "as to be heard cry or weep;" adding, that "the law hath well fixed the maturity of the children by their crying or weeping, and hath not left it to the conjecture of witnesses whether the child was ripe or not." 1. Mac Doual *Inst. Lib. 2. Tit. 6. fol. 663. citing Regiam Majest. Lib. 2. c. 58. concludes the same*: though *Erskine's Inst. fol. 329. says, that the cu-*

riality takes place "where the child hath "been born alive," without taking notice of the necessity of its being heard to cry. But in a late case of *Dobie v. Richardson*, which was heard in the court of session in Scotland July 17, 1765, a note of which I have been favoured with from a gentleman at the Scotch bar, the law was holden as above. There *Dobie's* wife brought forth a child about nine months after marriage, which breathed, raised one eyelid, and expired in the usual convulsions about half an hour after its birth, *but was not heard to cry*. The mother died in childbed; and the question was, Whether the *jus mariti* was not lost by the death of the wife within the year without a child of the marriage *who had been heard to cry*? After much argument on both sides, the decree was, "that as the wife did not live a year and a day after her marriage, and *as it was not proved* that the child or *factus* of which "she was delivered *was heard to cry*, the "husband was not entitled to any part of "his deceased wife's effects."

Payment without an acquittance is no plea to debt on an indenture to pay a sum of money. Moor, 12. 5. E. 3. 63. b. 1. H. 6. 8. a. 18.

(160) **A** MAN was bound by indenture to pay a certain sum of money; and in an action of debt upon this deed, the defendant pleaded that he had paid the sum, &c. without an acquittance.—MOUNTAGUE said, the plea

(160) Hil. 35. Eliz. B. R. *¶ Sir Christopher Blunt's* case. In debt upon a lease for years made in London, of lands in Pembroke, defendant pleaded payment generally, without concluding to the point of the writ. and so he owes him nothing; and yet ruled good, and that the trial shall be where the land is. Note, 33. H. 6. 3. 28. E. 3. 90. a.

E. 41. Eliz. Action of debt upon a single bond, and the defendant pleaded payment without shewing any acquittance, and it was at issue, and by the verdict it was found against defendant that he had not paid; the verdict has made all the plea and issue good; so if they had found for the defendant that he had paid it; for it is only mispleading, which is added by the verdict, *per Cur.* [5. Co. 43. a.]

was bad ; for this indenture is like a single bond, in which case payment is no plea without an acquittance. Otherwise it is if the bond have a condition, &c.

Præsumptio, 180. 1. 5. H. 7. 16. 33. 41. 46. E. 3. 25. 29. 5. H. 7. 41. a. 21. E. 4. 42. a. 25. H. 6. 16. a. 30. E. 3. 3. a. 33. H. 8. 51. a. 1. H. 5. 7. a. 12. H. 4. 24. b. Post. 51. a. [Cro. Jac. 377. Cro. Eliz. 455. See 5. Com. Dig. 255.]

(161) **TRESPASS** was brought against *I. S. of D. Knight*, who was found guilty; and brought attaint by the name of *I. S. Knight*. And notwithstanding that variance, the writ was holden good, because it is a new original, and founded upon no record merely. See 3. H. 6. [16. a.] in *estrepement*.

30. b. 49. H. 6. 19. a. 2. H. 6. 9. 39. E. 3. Variance, 49. 32. E. 3. 44. Estrepement, 2. Bro. Variance, 3. [1. Com. Dig. 43. (H. 7.) 1. Term. Rep. 240. 476.]

(162) **NOTE**, That in evidence to an inquest it was agreed by *FITZHERBERT* and *SHELLEY*, That if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing; otherwise is it, if he have notice of the quality of the dog.

210. b. 111. a. Bend. 17. [Bull. Ni. Pr. 77. 12. Mod. 332. Vid. Exod. c. 21. v. 29. and 36.]

(162) 24. Eliz. At an affize, an action on the case between *† Dogge and Cooke*—and by *LORD ANDERSON Dogge* was driven to give in evidence that the dog had been used to kill sheep.

E. 39. E. 3. B. R. Rot. 10. *† William Morgan, Knight*, impleaded *John Cronet* for chasing his pigs and sheep with dogs at *Sambro*, and for the biting of the said dogs, so that the said pigs died; the jurors said, that the aforesaid *John* was not guilty, nor did command his servants, nor was it done by his command, but as for the biting of one of the sheep, of the price of 5s. 8d. his servants did this; and the jurors, being demanded whether the aforesaid dogs were accustomed thus to bite without any instigation, said positively that they were not; wherefore let the plaintiff take nothing by his writ, and let *John* go thereof without day. Out of Mr. Nov's book.

(163) **THE** committee of a ward of the king commits waste; and then offers marriage to the heir, and he refuses, and marries elsewhere; and then the waste is found by inquest of office; and afterwards the committee brings *forfeiture of marriage*: and, Whether it lies? is the

Though the committee of the king's ward lose the custody of the land for waste, yet he may maintain forfeiture of the marriage. [Bendl. 21. pl. 33. S. C.]

(163) M. 19. Jac. C. B. In a case put by *SERJEANT HARRIS* to the Judges, it was ruled, That if, after the alienation in mortmain, the church become void, and the Abbot present, and six months pass, that the lord at any time within the year may remove the incumbent; for the act of parliament gives all that time to the lord to enter, and therefore when he follows the statute, no *laches* shall be imputed to him. And that case was put by *SERJEANT HINDON*,

question

298. 369. 32. Cro.
103. pl. 7. 21. E. 3.
27. b. 25. E. 3. 11. b.
7. H. 6. 11. b. 9. H. 6.
25. a. 47. E. 3. 11. b. 3.
Co. 37. a. 12. H. 4. 5. b.
Fitz. 59. a. Co. Litt.
54. a. 2. Inst. 14.
Nat. Br. 38. b. Vet.
Nat. Br. 34.

Mag. Charta, r. cap. 4.

question.—KNIGHTLEY thought that it lies; for if there be lord, mesne, and tenant, and the mesne grant his mesnalty in mortmain, by reason of the mortmain the lord paramount may claim the mesnalty within the year and a day; and if the tenant die, his heir under age, and the Abbot seize the ward before the claim of the lord, the Abbot shall have the marriage as a vested chattel.—SHELLEY wished to consider till the morrow; at which day his opinion was, that by the waste done by the committee, only the wardship of the land was lost, and not of the body, by the express words of the statute of *Gloucester*, cap. 5. (a).

(a) Marriage, wardship, and the rest of the feudal services, abolished by 12. Car. 2. c. 24.

Holmes's Case.

The committee of the body and lands of a lunatic shall not have aid of the king in trespass brought against him.

Moor, 4.
1. And. 23.
[Bendl. 17. pl. 23.] } S. C.
4. Co. 134. b. 3. H. 6.
34. a. 2. 9. H. 7. 3. a.
15. a. Hob. 155.
Hutt. 16. 164. Ca. 10.

* [26. a.]

[1. Bl. Com. 303. 304.
305. 306.]

8. Co. 170. Stamf.
Prærog. c. 9. & 10.

[1. Bl. Com. 305. 306.]

(164) **I**N TRESPASS against *Holmes*, he pleaded, that the place where, &c. is ten acres of land, whereof *Franches of Paddington in Middlesex* was seized, and became lunatic, wherefore the King seized by a commission, which was of certain lands in *Paddington*, and did not find the certainty; and granted by letters patent the custody and government of the aforesaid *F.* without account to be rendered; and he prayed aid of the King: and it was demurred in law whether he should have the aid; and adjudged that he shall not have aid, as well for these reasons as for divers other defects in the pleading.* And a difference taken between the seizing of the lands of a lunatic and an idiot; for in the first case neither the king nor grantee shall have any profit, but they are bound to find necessities for him and his household, by *Prærogativa Regis* [17. E. 2. c. 10.]; but in the other case the king and his grantee shall have it to their own profit: and *FITZHERBERT* thought that the lunatic shall have account when he comes to his sound memory; but it was denied; *ideo quare inde*.

(164) 3. Ed. 2. Fitz. Gard. 5. Infant is an idiot born, the king shall have ward all his life; but if he be a lunatic, he shall not have the wardship.

See *Prærogativa Regis*, c. 10. that their land and tenements they safely keep without waste and destruction, and that he and his family shall live and be sustained on the issues thereof, and that the residue beyond their reasonable sustenance be kept for their use.

(165) **A** MAN has an advowson, and the church becomes void, and the patron granted the next nomination, presentation, and institution, *when first and next* they shall be void; and, Whether shall the grantee have that avoidance at that time, or the next after that, or neither of them? For MOUNTAGUE moved, that it was a *chose in action*, and could not be granted. And FITZHERBERT and SHELLEY said, that the grantee shall not have the presentation at that avoidance, because it was void before the grant, but he shall have the next ensuing well enough; for the patronage remains always in the person of the grantor: wherefore, &c.

The church being void, the patron grants the next presentation *when first and next* it shall become void: the grantee shall not have the next presentation, but the next ensuing.

10. El. 269. a. 11. El. 283. a. Mo. 89. 1. And. 15. 32. 2. H. 7. 8. b. 5. E. 4. 8. a. 3. Mar. 170. a. Dy. 330. a. 30. b. Mo. 222. 914. 15. H. 7. 7. a. 29. H. 8. 39. a. [Gibf. Codex, 758. Watf. Cler. Law, 38. 2. Wilf. 180. 196.]

3. Leon. 196. 3. Burr. 1510. 1512.

(165) *H.* 30, & 31. Eliz. C. B. Grants to two *de bac vice*, afterwards the church becomes void, one releases to the other, adjudged void, because it is not grantable. [Dy. 82. b. note (28).]

(166) **N**OTE, It was agreed, that a man shall not aver the tenant to be pernor of the profits in *cessavit*; yet at another day they almost changed their opinions, and *advifare vol'* till the next Term.

Whether the tenant is *cessavit* shall be averred to be pernor of the profits.

[*Infra*, 32. a. pl. 3.]

14. Hen. 7. 17. b. 31. 15. H. 7. 8. a. 1. Co. 139. a.

(167) **A** LEASE is made to one for a term of ten years, reserving certain rent; the lessor leased and granted the same land to another to hold for a term of twenty years, the term to commence at such a Feast and year, the which is a year before the end of the first term: Whether it be requisite to have attornment in that case, or whether it passed as a new lease or a grant of the reversion? (168) FITZHERBERT thought this was not a good lease, inasmuch as it cannot take effect at the time it ought to begin from, and then it shall never be good afterwards; and BROOKE thought this opinion reasonable. And admit it were good, yet the lessee shall not have the rent of the last year of the first term without his attornment, for this must enure as a grant of the reversion; for a man can-

Where a man makes a lease for years, and afterwards makes another lease of the same land to commence before the expiration of the first term, the second lease is void (a).

1. Leo. 171. 239. 3. Leo. 7. Plow. 432. b. 18. El. 350. a. 32. H. 8. 46. b. Plow. 521. a. Dy. 124. b. B. N. C. 298. 349. Dy. 307. Plow. 421. b. Dy. 58. 178. a. 112. Plow. 43. a. b. B. Attornment, 41. 9. E. 4. 33. b. 21. H. 6. 7. 19. H. 6. 24. a. B. N. C. 379.

(a) See of terms for years when they are to take effect, 3. Bac. Ab. Leases (n); and *Goddard v. Fynnan*, Dougl. 365,

not make a lease of land, the demesne and possession whereof is not in him, but in a stranger, at the time of the making of the lease; to which BAULDWIN agreed; and SHELLEY by protestation *à contra*, and that it is a good new lease without attornment; and MOUNTAGUE said, that he had seen a book, that when only a chattel in reversion is granted, *it does not require attornment. Quære (a).*

(2) By 4. Ann. c. 16. § 9. attornment | c. 19. where it might prejudice the right-
is rendered unnecessary; and by 11. Geo. 2. | ful landlord or lessor's estate, absolutely void.

* [26. b.]

Prayers in aid may sever in their essoins; but in *scire facias* the prayee in aid cannot have any essoin.

[2. Inst. 251. 470.
2. H. 7. 10, 11.]

41. 43. 46 Ed. 3. 20. a.
18. b. 12. H. 8. 7. a.
Westm. 2. c. 45. 39.
H. 6. 5. 2. 15. H. 7.
11. 8. Fitz. Essoine,
97. 12. H. 6. 8. a.
25. E. 3. 38. a. 1. 5.
2. H. 7. 31. 8. 9. 1. 7.
H. 6. 39. a. 18. 21. 22. E. 4. 16. 51. & 65. 15. B. N. C. 216. 40. E. 3. 15. b. Hob. 47.
1. Inst. 251. [8. Co. 53.]

(169) * **I**N SCIRE FACIAS upon a recovery in annuity against the successor of a parson who prayed in aid of two as patrons, and of the ordinary, and at the day of the *scire facias ad auxiliand* an essoin was cast by one of the patrons and allowed; and they may be severally essoined, *per CUR'*; and FITZHERBERT said, that if the Court disallow an essoin where it ought to be allowed, it is error; otherwise is it, if it be allowed where it is not allowable. And afterwards, in the same Term, the essoin was disallowed by the whole Court. See 10. H. 6. [1.]

Under a power to *J. S.* by will "to have as well the government and ordering of tetta-
tor's children, as the
" disposing, letting, and
" ordering of his lands,"
J. S. cannot sell the land.

Owen, 32. 3. Cro. 679.
[734.] M. 3. Jac. Car-
penter and Collins, Yelv.
73. 5. Co. 29.
[3. Bac. Ab. 409, 410.]

(170) **C**ESTUY QUE USE declared by his will, "that *J. S.* should have as well the government and ordering of his children, as the disposing, setting, letting, and ordering of his lands." Can *J. S.* sell the land by these words? And by the opinion of the Court he cannot, inasmuch as the meaning of the deviser may be collected, that he wills his land should be disposed and ordered according to good order, and husbanded to the profit of the children; for it would be a bad ordering to sell the land of the children, by FITZHERBERT.

Russell's Case.

Plea of *Nisi Damni-
ficatus* to an action for
calling plaintiff "a false
" thief," is bad.

(171) **O**NE Christopher Russell brought an action upon the case against a man, who comes and defends the force, &c. and as to the speaking and publishing of the
aforesaid

aforesaid words, viz. "I will abide by it, that Christopher Mich. *nr.* rot. 326.
 "Ruffell was and is a false thief, and was at my door in Dy. 19. a. 75. a.
 "the sessions-day at night between one and two of the clock 26. H. 8. 9. a.
 "after midnight, and would have robbed me, and did break
 "open my doors, and did put me in jeopardy of my life," the
 said plaintiff is not damnified in manner and form, &c. And
 upon that plea the plaintiff demurred in law. And by the 1. Mar. 99. a.
 opinion of the Court the plea is clearly bad, for it admits
 the speaking of the aforesaid words, but that the plaintiff
 was not damnified by that; and what damage can be more [Syft. of Pleading, 51,
 grievous than such a report of him? And they were of 52. 5. Com. Dig. 220.
 opinion to give judgment for the plaintiff, if the defendant 221.]
 pleads nothing by the *Monday* next ensuing, at which day,
 by the opinion of the whole Court, a writ of enquiry of
 damages was awarded without any argument.

The Abbot of Westminster *against* the Executors
 of Leman Clerke.

(172) **T**HE Abbot of *Westminster* brought debt against
 the executors of one *Leman Clerke*, and de-
 clared upon a bond made at the city of *Westminster* on the
 10th day of *November* in the 12th year of the now king.
 The defendants pleaded an indenture of defeazance made at
 the city of *Westminster* in the county aforesaid between, &c.
 aforesaid; one part of which, &c. sealed with his seal, they
 bring into court, the date whereof is in the chapter-house,
 &c. on the same day and year (without shewing any date
 of the making of the indenture); by which indenture the
 predeceffor and convent demised to the said *Leman* the rectory
 of *S.* for the term of forty * years, if he should so long live, ren-
 dering twenty-two pounds by the year at the two Feasts of
Saint Philip and Saint James and of *Saint Peter ad Vincula*;
 and the aforesaid *L.* covenanted, that he and his assigns
 would bear and defray for the Abbot and his successors all
 expences, as well ordinary as extraordinary, and them save
 harmless thereof; and also would repair divers buildings
 during the whole of the said term, and them so repaired at
 the end of the term would surrender and deliver up, so as
 that it should not be lawful for *L.* to sell or aliene his term

Plea to debt on bond
 for the performance of
 covenants, and demur-
 rer thereto.

1. Leon. 309.

10. Co. 94. 106. 6.
 H. 7. 12. 20. H. 6. 7.
 23. H. 6. 7. 4.

* [27. a.]

Ditr. 65. b.

Godb. 99.

5. Co. 24. b.

Plow. 31. a.

41. E. 3. 29. b. Dier,
66. 15. H. 7. 8. a.

[1. Term Rep. 125.]

Dier, 57. a.

to any person without the special licence of the Abbot and Convent first obtained, under pain of forfeiture thereof. (173) And other covenants were contained in the indenture, all which the executors set out, but at the end of the recital they do not allege the common conclusion, "*as in the said indenture more fully appears;*" nor do they aver, "*which are all and singular the covenants, &c. contained in the indenture;*" by virtue of which demise the said *L.* occupied the said rectory from the said Feast, &c. until the 28th day of *September*, during which time he paid the rent at *Westminster*, at the Feasts, &c. and that he during the said term every year paid to *R.* bishop of *N.* five marks due to the said bishop for the appropriation of the said rectory, which are all, as well the ordinary as the extraordinary, &c. and saved the Abbot and Convent harmless thereof, and also repaired the buildings until the said 28th day of, &c. upon which day the said *L.* granted his aforesaid term and estate then to come to one *Payn* at *S.* in the county of *N.* and this they are ready to verify, wherefore they pray judgment if, &c. and to this the plaintiff demurred in law. (174) MOUNTAGUE, CHOMLEY, and WILLOUGHBY, thought the plaintiff should recover, for the plea is insufficient for divers causes: FIRST, The defendants have not alleged any date in the indenture; neither is it said, "after the making of the aforesaid writing obligatory," and then it shall be intended most strongly against the defendants, *s.* that it was made before the bond; for those words "on the same day and year" shall not be referred to the date of the bond, inasmuch as the defendant is a stranger to the pleading or declaration of his adversary; for if trespass be brought against two, one of them pleads a release by the plaintiff after the trespass, the other defendant pleads another release by the plaintiff after the trespass, *s.* on the same day and year, that is bad, because each ought to plead his plea certain, and shall not refer his plea to the plea of a stranger. (175) And therefore is the case in 14. *H.* 7. [21. b. 22. a.] in *quare impedit* against the bishop and the incumbent. The bishop made title to himself as patron, &c. the incumbent pleaded, that he was presented by the bishop, for the causes above alleged; the opinion there is, that this pleading is bad, but he ought to set out his title certain; also the bond and indenture are the deeds of two men; and the

the indenture is not like a defeazance of an obligation by condition, for the obligation and condition are all the same * deed, and ought to be made at the same time, and if the condition be altered or interlined, that will avoid the obligation; but although the indenture be interlined after that, it does not avoid the bond, because the indenture was made by itself, &c. (176) Also in the conclusion of the recital of the indenture it wants "*as in the said indenture more fully appears,*" which ought always to be shewn, when a man pleads a deed or record, and so is the common course of the entries: and also for the same default he ought to say here, "*which are all the covenants contained, &c.*" inasmuch as it may be intended more covenants are in the deed than are recited. (177) Also it is alleged, that *L.* paid during his occupation five marks to the bishop of *N.* and it is not alleged where he paid this; for this is an extraordinary expence, and issuable, and therefore he ought to shew a place whence the visne might come. Also he is bound that he and his assigns will pay all charges, &c. and it is not pleaded that his assigns have done it; for when a man is bound that he and his assigns, that is a copulative which ought to be pleaded *conjunctim*; (178) as if the condition or covenant be to enfeof one of the manor of *D.* and *S.* although he perform one, the other is not performed. And although the Abbot may have a writ of covenant against the assignee, that does not prove that the lessee himself is discharged of the covenant. Also it appears upon his own shewing, that he has made his covenant, which is, that he will not aliene without licence of the Abbot, and he shews not any licence; and although the statute made in the 21st year of the present king [chap. 13.] against spiritual persons occupying farms, &c. countervails a licence of the Abbot, because every man is privy to that (which they would not agree), yet that statute ought to be pleaded, for it is common doctrine, that where a statute gives licence for a thing, those who will take advantage of that statute must plead it; (179) as if a statute be made which licenseth every man to empark

10. Car. Cro. 399. 3.
Hen. 7. 5. a. 44. E. 3.
42. b. 14. H. 8. 28. a.
6. H. 7. 12. b. 11.
Co. 27. 13. H. 7.
18. a. Infra, 261. b.
1. H. 7. 15. a. 5. Co.
119. Cro. 162. a.

[Cowp. 665. 725. Doug.
667.]
6. E. 4. 1. Plow. 26. a.

[Cro. Jac. 360.]

Dier, 15. pl. 78. Plow.
191. a. 287. b. Bridg.
47. *

Cro. Jac. 523. 35. H. 8.
Bro. Covenant, 32. 5.
Co. 16. Dier, 52. a.
33. H. 8. 48. b. 21.
H. 7. 4. a. Residence
2. Yelv. 106. 108. 1.
Keb. 749.

4. Co. 76. b. Plow.
13. 53. 1. Keb. 732.

(178) The statute 5. *El.* c. 2. which compels to change pasture into tillage, what was so before, has a proviso to save obligations so to do, which proves that they would have been forfeited if there had not been that proviso.

(179) *M.* 18. *Jac.* C. B. [Winch.'s Ent. 151.] In covenant by *Rogers* and *Pool*, plaintiffs, against *Caldwell*, for that *J.* the assignee of *Caldwell*, did not pay to *R.* and *Pool* the rent

21. E. 4. 57. b.

23. E. 4. 8. b. Plo.
65. a. 31.

[1. Term Rep. 125.]

[2. Hawk. P. C. 560.]

8. E. 4. 7. a. 4. H. 7.
8. b. Plo. 484. b.

[2. Term Rep. 569.]

Plo. 79. b. 103. a. 7.
E. 6. 39. a. 3. Mar.
215. a. 26. H. 8. 7. a.

[Bal. Ni. Pri. 4.]

* [28. a.]

Plo. 211. a. B. & N. C.
6. Dyer, 557. 3. H. 4.
7. b. 1. Cro. 32.

[See] Dy. 144. b.

empark his ground, this ought to be shewn. Also when a man is to plead a private or particular statute, it ought to be alleged; for this Court takes cognizance of nothing but the common law, and if any particular statute be made, it ought to be alleged and pleaded; as if a man plead a private custom, as gavelkind, or borough-english, he ought of necessity to allege it: so here this statute is not general, for it extends only to spiritual persons: and although it were general, yet it is general in particular; as if a statute be made concerning all grocers in *England*, this is not general, because it does not extend to all men. (180) So if an act be made which pardons all men *who were of the party of King Richard the Third*, if that statute be to be pleaded, he must say that *he was of the party of King Richard*: but if the statute be general, there is no need for the party to allege it, because all men are bound to take notice of it; and also where a statute is made for the benefit of a man, if he will not use his advantage of it by shewing it, it is at * his peril: as if the king would pardon a man by his charter, he shall not have the benefit of it, unless he also wills it himself: so is the statute [28. E. 3. c. 13.] which says, "that when the matters of an alien born are in trial, it shall be tried *per medietatem linguæ*, yet if the trial "be by *Englishmen* only the judgment is not erroneous." (181) Also if a statute be made, that all tenants for life shall be punishable of waste, if an action of waste be brought against a tenant for life, and he plead *nul waste*

rent reserved by indenture at the day, when *Caldwell* had covenanted for himself, his executors, administrators, and assigns, that the rent should be paid at the day to R. And afterwards it was argued, Whether, after R. and P. have accepted J. for assignee, they can charge *Caldwell* by reason of that special covenant? And it seems in reason that they cannot, for it is in the nature of a collateral surety for the payment of the rent, and is not like debt in all points.

(180) H. 35. El. B. R. Debt brought against an administrator who was an alien, and he pleaded this, and prayed a trial *per medietatem*, and the plaintiff confessed this, and it is found against the plaintiff; but *per Curiam* the trial is bad, because the testator was an *Englishman*; otherwise if he had been an alien, for then, or if an *Englishman* be administrator to an alien, the trial shall be *per medietatem*; and in the principal case the admission of the plaintiff shall not make a trial which is contrary to law, good. 5. Co. 40. b. [As to how far consent shall cure defects, 1. Com. Dig. 303.]

M. 35. & 36. Eliz. B. R. *Dr. Julius Cæsar's Case* against *Curtine*, [Cro. Eliz. 305. Poph. 35. 10. Co. 104. a.] for slander, being judge of the admiralty, for which *tales* are grantable by 35. H. 8. c. 6. upon a trial *per medietatem linguæ*, and that if it be an alien juror who makes default, the *tales* shall be of aliens, and *vice versa*.

Easter, 9. Car. B. R. by JONES, Justice, It is usual where the trial should be *per medietatem linguæ*, if the sheriff return six aliens, when in truth they are natives, and so they be impannelled, &c. that it be held good enough; but if eight natives and four aliens be impannelled, that is bad, because there it is not *per medietatem*; and if there be a defect of an alien, it ought to be supplied by an alien *tales*, for the words are relative, So resolved by RICHARDSON, JONES, CROOKE, and BARTLETT, *ut supra*.

fait,

sait, Shall he give the statute in evidence? By no means; wherefore, &c. And also the plea is that he granted to one *Payne*, and does not shew whether he be a spiritual- or a lay-man; and the statute says, that he must grant his term to a layman, and now it shall be intended most strongly against himself, *s.* that he was a spiritual person, and then the grant is void: and admitting that it would be good, still he ought to allege that *Payne* has paid the rent and performed all other covenants. (182) For although the statute says, that otherwise estates shall be void, yet it is necessary to aver a circumstance, *s.* an entry in fact of the lessor; for so long as the term continues, the covenants ought to be performed; as the statute lately made is, that the possession shall be adjudged according to the use; still it is necessary to aver a circumstance which is at common law, *s.* an actual entry in fact, &c. Wherefore, for all these causes, the plea is bad. KNIGHTLEY (who argued *ex improviso*) and MARYVNE, *è contra*. (183) And as to the first exception, which is to the date of the indenture, that is certain enough, and may well be referred to the date of the bond, for when a deed is once shewn to the Court, the whole deed well appears to the Court, for it supports itself; as in trespass against two, one pleads a release from the plaintiff since the trespass on such a day, &c. the other shall say, upon the day and year above mentioned, and that is well enough. And although there is no date in the indenture, yet the defeazance is good enough, for there is a clause in the indenture which recites the date of the bond, to defeat the bond if the covenants be performed. (184) And as for saying he ought to shew that *these are all and singular the covenants*, &c. clearly it is not so; for when a man refers his plea to any record or matter in writing, he shall not take such an averment: as if I be bound to enfeof you of all the lands contained in such a fine, I shall shew the record of the fine, and aver, that of them I have enfeofed, &c. and it is good; but when there is something to do *dehors* the matter in writing, it is other-

12. H. 8. 1. 5. Co.
119. b. Dyer, 276. a.

9. Co. 36. a.

5. Co. 118. b. Dier,
30. a.

[Bull. Ni. Pri. 169.]

Dier, 23. a. Flo. 46. a.

(182) *Trin. 19. Jac. C. B. & Coustons's Case*, Debt brought upon a lease for years; the defendant pleaded that it was made to him upon condition that if the rent should be in arrear the lease should be void, and shewed that the rent was in arrear on a certain day before the rent in demand is supposed to be in arrear, and so the lease is void, and he demands judgment if he ought to have debt upon that contract; and upon demurrer it was holden by the Court, that the lease is not void upon the arrearage of rent only without demand; otherwise in case of the king; and because the rent being in arrear is not alleged to have been demanded, judgment was given against the defendant. [3. Bac. Ab. 396.]

6. 9. E. 4. 1. 15. 36.
H. 6. 10. b. 20. H. 6.
31. b. 12. H. 8. 7. a.
4. 13. H. 7. 12. 19. a.
22. E. 4. 15. a. 6.
H. 7. 6. 2. R. 3. 17.
Dier, 15. a.

* [28. b.]

5. 10. 21. H. 7. 24.
16. 22. b. 1. E. 5. 3.
Flo. 191. a. 149. b.

Dier, 48. b. 3. E. 4.
27. a.

13. E. 4. 3. b. Dier,
119. a. 85. a.

[Co. Lit. 206.]

4. Co. 76.

[2. Term Rep. 569.]

Mo. 303. 619. Noy,
100.

3. Cro. 149. 21. H. 6.
28. b. 7. E. 6. 85. a.
Fit. 115. b. 8. E. 4.
5. b. 19. H. 6. 29.

Post. 257. b. 57. a.

2. Brownl. 135.

wife; as if the condition should be to enfeoffe one of all his lands in *Middlesex*, he shall aver that twenty acres are all of which, &c. (185) And as to the other exception, that he ought to shew where the five marks were paid to the Bishop for the appropriation, that is not necessary; for when a man pleads a thing which ought to be taken by common intentment to be issuant out of land, if he * plead the same without shewing the place, that shall be intended to be upon the land; as if a man plead attornment, or surrender, if he do not shew where it was, then it shall be intended to be upon the land: so here, &c. (186) And further he thought, that the statute is a licence, inasmuch as every man is a party to that: as if the condition of an obligation be, that if the obligor carry twenty quarters of wheat before a certain day into a foreign county, the obligation shall be void; and before the day a statute he made, which prohibits any man from carrying corn into a foreign county; that is a dispensation with the condition. (187) And as for the necessity of pleading the statute, he thought it not necessary, for every statute is a common law, if it extend to all men, as that statute does; for the statute touches every man as well as a spiritual one; for it says, that the lease shall be void against the lessors unless it be granted before a certain day, &c. (188) And also the statute is in the care of the Judges, whereof they are bounden to take notice; and therefore in the parliament in the 25th year a statute was made which pardons all felonies that were under the sum of twenty shillings. If any one should be arraigned before them of felony under that sum, and acquitted, he shall not have a writ of conspiracy against his indictors, because he was not acquitted in a legal manner, for the Justices did not well in arraigning him, but should have immediately set him at large: to which FITZHERBERT assented. (189) Then as to the last matter, Whether it be necessary to allege that *Paine has performed all the covenants*? they thought it was not; and they founded their reason upon the arguments aforesaid, viz. that *Paine* was a spiritual person, wherefore the grant to him is void: then it follows, that at the Feast of *Saint Michael* then next ensuing the term was void by the statute; and if so, then there is no question but that all the covenants are dispensed with and discharged, for the covenants can continue no longer than the term has being; for

for suppose that within the term the lessee surrender to the lessor, are not the covenants determined? Yes surely.— (190) And as for what was moved, that the term has continuance, notwithstanding the statute, till the lessor enter, clearly that is not so; for if the law determine the term, then the lease and privity between them is determined; and although the lessee occupy the land afterwards, yet he is not termor, but tenant by sufferance, and the lessor shall not make an avowry against him, nor does action of debt lie for the rent reserved upon the first lease, s. during the term for years; and so it is, if the term expire, and the lessee continue his possession, yet the covenants are determined. (191) And it is not like the case in 9. H. 6. [43. a.] where a man seised of land in right of his wife made a lease for * years, rendering rent, and the wife died within the term, the lessee shall pay the rent during the term, until the heir of the wife enter, for there he continues termor still by force of the first lease; but no avowry lies by the husband, because he has not the reversion; and an action of trespass *vi et armis* well lies against him, but he shall not have action of debt, &c.: wherefore it seemed to them for all these causes, that it was not necessary to allege more in the plea than is alleged; and then the plaintiff shall be barred. (192) And in the same Term FITZHERBERT said secretly to SHELLEY, that the plea was bad for another reason, s. because it is not alleged, “*that at the end of the term the buildings were sufficiently repaired, according to the indenture;*” but SHELLEY would not agree to that, yet he did not give his reasons why, &c. And afterwards JENOUR, *prothonotary*, was ordered by the Court to enter judgment for the plaintiff.

[Co. Lit. 270. b. Mr. Butler's note (1). 3. Term Rep. 4ca. 1. Hen. Black. 8. cont.]

Plowd. 133. b. Fitz. Debt. 9. 7. H. 6. 43. a. Bro. Leases, 4. & Debt. 7.

14. H. 6. 26. a. 2. E. 4. 11. a. 45. E. 3. 8. a.

* [29. a.]

(193) I N account the plaintiff declared, that the defendant had received tin of the plaintiff, to render an account. The defendant pleaded, that he had sold the tin to one J. S. and took a bond for it in the name of the bailor. And it was holden no plea in bar to account, but a good plea before auditors in discharge, &c. and the defendant cannot sue upon that bond.

35. a. 7. a. 41. E. 3. 31. a. 5. H. 5. 5. a. 1. E. 5. 2. b. 6. Co. 44. b. 30. E. 3. 23. a. 1. Rol. Ab. 124. 1. Bull. 103. [3. Wilk. 113. 1. Com. Dig. Accompt. (E. 6.)]

To an action of account for tin, it is no plea in bar, that defendant sold it, and took a bond in the name of the plaintiff; but it is a good plea before auditors.

1. a. H. 6. 8. 9. a. Dy. 21. b. 169. b. 5. 9. E. 4. 4. b. 40. b. 21. E. 4. 67. 22. 28. H. 6. 43. b. 29. E. 3. 40. b. Dig. Accompt. (E. 6.)]

If an agreement between tenants in common to present to an advowson by turns, be once executed, the agreement need not be shewn in *quare impedit* brought afterwards amongst them.

37. 14. H. 6. 9. b. 15.
b. 9. 39. E. 3. 16. b.
37. F. monst. de fait,
70. 5. H. 7. 8. a. F.
N. B. 34. 1. 6. Co. 12.
b. 38. 4. E. 3. 16. 52.
15. E. 4. 16. b. 11. H.
4. 39. a. Plo. 149. 28.
H. 6. 2. Dyer 350.
3. E. 4. 9. 3. H. 4. 2. a.
Rol. Rep. 221. pl. 26.]

(194) NOTE, It was holden by FITZHERBERT, SHELLEY, and many of the Serjeants, that if three tenants in common of an advowson agree that each of them shall present by turn; if each of them have once presented in his turn, by virtue of the agreement, in a *quare impedit* brought afterwards amongst them, it is not necessary to shew the agreement, because it is executed; otherwise it would be if it were not executed. And amongst coparceners, agreement may be made without writing, because by the common law they are privies, and as one heir, and compellable to make partition.—So there is a diversity.

7. 30. E. 3. 29. 20. a. *Quare Imp.* 20. Godb. 94. [Co. Lit. 269]

If a dog kill sheep without his master's setting him on, he need only plead the general issue in trespass for that killing.

F. N. B. 89. L. 20. E. 4. 11. a. 3. 43. E. 3. 3. a. 8. a. Fulb. Par. li. 1. fol. 81. 4. Co. 18. [12. Mod. 332. Bull. Ni. Pr. 77. Vid. Exod. c. 21. v. 29. & 36.]

(195) E. 2. Car. B. R. *Miller and Faudrie's Case* agrees with this. [Sir W. Jones. Lat. 13. 119.]

* [29. b.]

When the confessor, suing upon a fine sent by mittimus out of chancery into B. R. dies, a fresh mittimus must issue to authorize the Court to proceed to execution for the heir.

22. E. 3. 6. b. 1. Leon.
144. Fitz. Scire Facias,
13. 14. 33.

† Orig. *Circumstance*.
Dyer, 32. 12.

(196) MOUNTAGUE put this question: In the time of H. 8. 4th, a transcript of a fine was removed out of the treasury into the chancery, and sent in by mittimus, with intent to have * execution of the fine by *sci. fa.* and during that suit, he at whose suit the fine was removed, died: Now is it necessary to have a new certificate of the fine by a new writ out of chancery, or can the Court here award upon that fine a *sci. fa.* at the suit of the heir of him who first put it in suit? (197) SHELLEY. It seems to me, as at present advised, that there is no necessity to have a new mittimus, inasmuch as the record remains here before us: and it would be futile to have a new † certificate, &c.—FITZHERBERT. That reason may be answered, for the mittimus gives us authority, inasmuch as the record of the fine does not remain with us after it is removed into the treasury of the king, and the mittimus is, *that we proceed at the prosecution of such an one*; and when he is dead, our warrant

rant is determined, for we cannot proceed at the prosecution of another. Wherefore, &c. And T. 9. E. 4. [15] and divers other Books are so ruled. (198) SHELLEY. "Truly you have effectually answered me." Wherefore they advised MOUNTAGUE to sue by a new certificate; and so he caused it to be sued. But see 14. H. 7. [15] ruled, that it is not necessary for the heir to do this, because he is privy; but for him in remainder it is otherwise, &c. See 11. E. 4. fol. 11. b. of the same matter.

(199) **I**N trespass the defendant pleaded, that the place in which, &c. was ten acres of land, whereof the king was seised in fee, in right of his crown, and by his letters patent granted the land to the *Lady Carew*, for term of life, who leased to the defendant for years; and averred the life of the first lessee, and so justified. And it was moved, Whether the plea were good, without shewing the letters patent? And it was clearly holden by KNIGHTLEY, MOUNTAGUE, and FITZHERBERT, that the letters patent must be shewn.

(200) For if I grant a rent to one for life, or in tail, or in fee, and he grant over a less estate in it, the second grantee must shew both deeds. So it is of the grant of an advowson to one who grants it over, &c. BROWNE, WILLOUGHBY, and BALDWIN, *à contra*; for a sub-collector, an under-sheriff, and an incumbent do not shew the king's patents, because they do not belong to them, and they have no means to make their masters or grantors shew them. And it seems by them, that there is a diversity when the grantee of the king grants over all his interest, for there the patent belongs to the grantee, and therefore he shall shew it, but when he grants only parcel it is otherwise, &c. (a)

(a) In *Dr. Leyfield's Case*, 10. Co. 88. this case is discussed much at large, and the point that there must be a *proferri* of the letters patent fully determined by all the Judges, on error in *Cam. Scaccb.* And they held it to be substance, and the omission to

be bad on general demurrer; but now see 4. & 5. Ann. c. 16. See also Salk. 497. But to a *quo warranto* information, letters patent may be pleaded without a *proferri*, *Rex v. Amery*, 1. Term Rep. 149, 150.

Whether upon a justification in trespass as lessee of the grantee of the king, defendant must shew the letters patent.

29. Aff. 21. 6. Co. 38. b. Dyer 54. a. 115. 34. H. 8. 58. a. 10. Co. 92. a. Fitz. Monstrans de Faits, 86. 21. E. 4. 50. a. 20. H. 7. 6. b. 35. H. 6. 9. a. 22. Aff. 53. 38. Aff. 28. 13. H. 7. 14. a. 3. H. 6. 20. b. 12. 9. H. 7. 16. b. 23. b. 28. E. 3. 90. b. Dyer 139. 171. 22. H. 6. 42. a. Plow. 148. b. 81. b. 31. H. 6. 14. 92. 31. E. 3. Monstrans de Faits, 177. 39. E. 3. 21. a. F. Monstrans de Faits, 38. 161. 1. Bull. 154.

(201) **I**N detinue for forty quarters of wheat, the plaintiff declared simply upon a contract for wheat, &c. the defendant pleaded, that the plaintiff bought of him eighty

To an action of detinue on an *absolute* contract, defendant may plead that the contract was *conditional* without a traverse quarters

6. E. 4. 11. b.
34. H. 6. 42.
1. Saund. 208.

[4. Bac. Ab. Plea, (H. 1. & 3.) Mo. 870.]

21. E. 4. 29. a. 33. H.
6. 44. a. 32. H. 6. 4.
44. E. 3. 28. 1. Rol.
Ab. 188. Dyer, 32. b.
7. H. 7. 5. 32. H. 6.
4. a. 9. H. 6. 55. b.
21. E. 4. 22.

1. Rol. Ab. 248. 5. E.
4. 6. b. Hob. 41. 88.

20. H. 6. 35. b. 14. H.
7. 19. 20. 14. H. 8.
19. 22. 17. E. 4. 1. b.
21. H. 7. 6. b. 10. H.
7. 8. a. 5. E. 4. 2. b.
49. H. 6. 18. b. 10. E.
4. 18. b. 18. E. 4.
22. a. 4. Co. 94.

[1. Ld. Raym. 665, 666.
See the cases of Peeram
v. Palmer, Gilb. Law of
Evid. 191. Jones v.
Berkeley, Dougl. 684.]

quarters, upon condition that * when the plaintiff came for the wheat, he should pay immediately, or otherwise the whole to be void; and further said, that the plaintiff had received thirty quarters of it, and satisfied, and paid him for it; and at another day he came and received ten quarters, and has not paid for them, and so the contract became void; judgment *fi adlio*, &c. And it was urged by KNIGHTLEY, that it was necessary to take a traverse, because it cannot be intended all one and the same contract, s. without this that the contract was simple. (202) FITZHERBERT and BALDWIN thought the traverse should come from the other party; as if in assize the tenant plead simply a feoffment of the ancestor of the plaintiff, the plaintiff replies that it was upon condition by deed, the tenant shall say that it was made simply, without this that it was upon condition. But it was agreed, that the defendant might wage his law, or plead, if he will, *non detinet per patriam*. (203) And KNIGHTLEY prayed, that the 30 quarters might be struck out of the plea. But the Court refused it. And this diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon it without payment; but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue.

Cestuy que use after the statute of uses may distrain for rent upon the lessee for life, under a lease made by the feoffees before the statute without attornment.

Kitchin, 91. b.
30. H. 8. Bro. Abr.
Attornment 29. Dyer.
30. a. 6. 8. Co. 98.
68. a. Plowd. 133.
435. b. Bend. 9.

(204) THE feoffees to an use made a lease for life, reserving certain rent, before the statute of uses. [27. H. 8. c. 10.] The opinion of all the Court was clear, that by the statute, *cestuy que use*, who has now the reversion in possession, may distrain and make avowry for the rent without attornment (a). And so the law would be if they had granted a rent upon condition; after the statute the grantee should hold it by the condition, in the same manner that he did before.

(a) By 4. Anu. c. 16. s. 9. Attornment | c. 19. in some cases absolutely void, Dougl.
is rendered unnecessary, and by 11. G. 2. | 281.

(205) THE

(205) **T**HE condition of an obligation was such, that the obligor should surrender a certain copyhold, and also should suffer the obligee and his heirs peaceably to enjoy the land without interruption of any one. The defendant pleaded performance, and also that the plaintiff peaceably continued his possession according to the condition for a certain time, and then the lord, for the rent being in arrear, entered according to the custom for a forfeiture; and judgment *fi actio, &c.* And this was holden a good plea. And the law is the same if the obligee were tenant at common law, and determined the tenancy, the obligation is saved, because it was the act of the plaintiff himself. *Quod nota.*

If an obligee, by his own act, occasion the forfeiture, it cancels the bond, and the obligor ceases to be liable.

30. H. 8. 42. a. 31.
H. 8. 45. 46. 11. H.
7. 7. b. 2. E. 4. 15. a.
Hob. 35.
[Co. Lit. 206. 207. 1.
Bac. Ab. 434, 435, 436.
1. Term Rep. 645.]

Dy. 42. a. 240. 328. a.

* [30. b.]

(206) **I**N debt against executors brought in the county of *Middlesex*, the defendants pleaded *pleni administraverunt, &c.* the plaintiff replied, that they had assets in *Essex*, and to this the defendants demurred; and judgment was given for the plaintiff, because the assets are a thing transitory, and if it were in issue, and trial before a jury of *Middlesex*, they might find assets in any county in *England*. And this was now lately adjudged *PER CUR. &c.*

In debt in *Middlesex* against executors who plead *pleni administraverunt*, plaintiff may reply assets in another county.

[Went. Off. of Exor.
169, 170. 2. Cro. 55.
503.]
6. Co. 46. b. 47. a. B.
N. C. 451. 22. E. 4.
19. a. 10. El. 271. b.
3. H. 7. 11. a. 5. H.
7. 27. Went. 248. 244.

Compton against Brent.

(207) **I**N chancery the case was as follows between *Compton* and *Brent*:—*Compton* purchased a copyhold of the lord of *Audley* to him and his wife and his child, for the term of their lives, &c. The lord of *Audley* let the freehold of the soil by deed indented to *Brent* for the term of his life, reserving to himself a certain rent, and livery of seisin was made accordingly. Afterwards *Audley* levied a fine *sur cognizance de droit come ceo que il ad de son done*, to *Compton* of the same land, and *Compton* accepted the rent of *Brent*: Whether the copyhold of *Compton* was gone in equity? was the question, &c. And there this case was put: If a disseisor make a lease for term of life reserving certain rent, and after-

B. purchases a copyhold for lives of the lord, who makes a lease of the freehold of the soil to *A.* rendering rent, and afterwards levies a fine of the manor to *B.* who accepts rent from *A.* Whether is *B.*'s copyhold gone? *Qu.*

4. Co. 24. b. 31. 2.
Co. 17. Davis's Rep.
33. b.
9. Co. 107. a.
Palm. 112.
11. H. 6. 24. Fitz.
Cui in Vitā 1. 26. H. 8.

(207) T. 23. El. by Walmsley, Periam, and Mead, that if a disseisor lease for years, and grant the reversion by deed † poll to the disseisee, and the lessee attorn, it is a remitter, and he shall hold the tenant out.

† Orig. parol.

a. a. 8. H. 5. Fitz wards grant the reversion to the disseisee, and he accept the
 Jurisutrumque, 19. 21. rent of the lessee, he shall never oust him; *quod fuit concessum*
 M. 7. 39. a. 39. H. 6. *per quosdam.*
 37. b. 17. Aff. 3. 5.
 H. 3. Droit, 66. 15. E.
 4. 17. a. 18. 6. H.
 7. 3. 5. Co. 15. [2.
 Term Rep 415. Lex
 Cus. ch. 23. Nelf. Lex
 Man. Forfeiture, (1).
 1. Bac. Ab. 451.]

Breverton's Case.

The king's grantee of a
chose in action may sue
 upon it in her own
 name.

Poulton, 228. B. N. C.
 153. Saville, 3. 133.
 Palm. 190.
 Stamf. 188. a. 5. E. 4.
 8. b. 21. H. 7. 11. b.
 Dy. 26. a. Bro. Prero-
 gativ. 45. 4. H. 8.
 1. b. Plcw. 2. 43. a.
 2. H. 7. 8. b. 39. H. 6.
 26. b. 10. Co. 48. a.
 3. H. 4. 8. a. 19. 34.
 H. 6. 47. 30. 39. H.
 6. 29.
 [2. Vern. 539. 595.
 Harg. note to Co. Lit.
 232. b. Cro. Jac. 82.
 179. 180. 1. Term
 Rep. 619. 2. Black,
 Rep. 821.]

(208) **T**HIS case was debated in the exchequer: *Bre-*
verton, who was attainted of treason on the last day
 of *Easter Term*, had certain bonds which were forfeited to
 the king, and the king granted those bonds to the wife of
Breverton, without any words to empower the grantee to
 bring actions upon the bonds in her own name; and yet the
 wife brings an action, *viz.* an information in her own name
 upon the bonds; and upon this, there was a demurrer in
 judgment, because the suit was in her own name; and, Whether
 it ought to be in the name of the king? was the question.
 And it was adjudged (*ut audiui*) that the action was well
 brought, for the king alone may grant a *chose in action*.
 And for the same reason that he has granted the bonds, which
 are the substance and foundation of the actions, the law im-
 plies that the grantee shall use the means to come at the
 things granted, &c.

A lawday or warren in
 a manor doth not pass
 by a feoffment of the
 manor without *cum per-*
tinentiis.

Bendl. 20. 1. And. 26.
 58. Moor, 427. Fitz.
 Avowry, 211, 212.
 11. Co. 8. b. 7. Co.

(209) **T**HERE are three co-parceners of a manor, and
 the king grants to them a lawday, and they make
 a feoffment of the manor; notwithstanding this, they shall
 have the lawday. So is the law also, if a man have a manor,
 and the king grant to me a warren within the same manor,
 if I afterwards enfeoff the king of the manor, without the

(209) T. 23. *Eliz.* A. has a warren in his lands, and lets the lands to B. rendering rent; B. kills the conies, and A. brings trespass *quare vi et armis*, for the warren does not pass by the lease.

Benloe, [11. pl. 45.] 28. H. 8. Three co-parceners seised of a manor whereto a leet belongs, and the king purchases two parts of the manor; yet the leet, by such purchase, is not extinguished, but remains appendant to the third part of the manor.

There is a difference between a warren used to a manor from time immemorial, and a warren appendant; for, in the first case, it shall not pass by a grant of the manor *cum pertinentiis*, for it is not parcel; in the other, it shall pass, but not without these words, *cum pertinentiis*, 8. H. 7. 4. b. 5. a.

appartenances, I shall have the warren. And also a man may have a warren or lawday in other lands, PER TOTAM CURIAM.

Bro. Warren, 7. Davis, 5. b. [11. Co. 13. b. Poph. 169. Vin. Ab. Extinguishment, (c).]

23. b. 8. H. 7. 5. a.
32. H. 6. 24. b. 42.
E. 3. 4. a. 13. a. 3.
H. 6. 13. b. 35. H. 6.
55. b. 14. H. 4. 6. a.

* [31. a.]

*(210) **I**N B. R. the case was as follows: A man made a lease for life, and afterwards the lessor made a lease of the same land, for a term of twenty years, rendering certain rent, *the term to commence after the death of the lessee for life*; then afterwards the tenant for life granted his estate to the lessor, and the lessor during the life of the lessee for life enfeoffs a stranger in fee, who suffers a recovery to *Walsingham*, and divers others; and afterwards the tenant for life died, and avowry was made for rent by the recoverors. (211) And two points were moved in this case by WILLOUGHBY and MOUNTAGUE. The first, that the rent should be extinguished by the feoffment; as if a man make a lease for years, rendering rent, and enter, and make a feoffment, although the termor re-enter, the rent is not revived, because it was extinguished. FITZJAMES said to them, "Do not be so clear of that first case, for it is the case of many men; and although the law be so, yet there is a great diversity between the cases; (212) for in the case at bar, the rent does not begin till after the death of the tenant for life, and so the rent was not *in esse* when the lessor made the feoffment, wherefore it cannot be extinguished by that feoffment." KNIGHTLEY. "I do not agree to the first case, that if the lessor oust his termor, and make a feoffment of it, the rent shall be extinct; but it is a doubt in 9. H. 6. [16. b.] whether the feoffee shall have debt for the rent, because he was not privy to the contract; but in avowry it is the opinion that he may have it. (213) And although the law were that the rent shall be extinguished, yet as my lord FITZJAMES has well said, the cases are not alike, because the rent was not *in esse* at the time of the feoffment; for it is as if I should make a lease for the term of forty years, reserving ten shillings at the end of twenty years, now if I make a feoffment before the twenty years, after the twenty years the feoffee shall have the rent." (214) The other point was, That this case was out of the

A man made a lease to *A.* for life, and to *B.* for years, rendering rent, to commence at *A.*'s death, who surrenders to his landlord; he before the death of *A.* makes a feoffment to *C.* who suffers a recovery; afterwards *A.* dies. The rent is not extinguished by the feoffment; and the recoveror may distrain upon *B.* for rent arrear under 7. H. 8. c. 4.

Mo. 11. 281.

[Cro. Jac. 643. See the cases cited, 8vo. Edit.]

Cro. 109. a. 4. El.
212. b. 5. H. 5. 12. b.
30. E. 3. 7. 6. Co. 69.
Plow. 431.

6. Co. 70. Inf. 33. b.
5. Co. 113. b. Br. Ex-
tinguishment, 4. [54.]

7. Inst. 104. b. cont.
Recoveries, 1.

statute 7. H. 8. c. 4. which says, " the recoverors, their heirs, and assigns, may avow, and justify, for rents, services, and customs, by them recovered, as those persons might against whom the recovery was had." And in this case, he against whom the recovery was had, could not make any avowry; *ergo*, this is out of the statute. KNIGHTLEY, " Then demur in law to the avowry, if you choose it." But WILLOUGHBY and MOUNTAGUE prayed day until another Term, and had it.

It seems the avowry is good; for the words of the statute are, " that they shall make avowry as those persons against whom the said recovery is, should have done." Co. Litt. 104. b. agrees that it is good.

* [31. b.]

Whether in waste by the grantee of the reversion, the lessee may plead *ne granta pas per le fait*, or, *riens passa per le fait*, and give in evidence that he never attorned?

14. H. 8. 19. a. 26.
H. 8. 2. 11. Co. 89. b.
Dyer, 122. b. 234. b.
5. H. 7. 8. b.
Perk. §. 130.

(215) **I**N waste, the plaintiff declared upon a lease made to the defendant by I. S. who had granted the reversion to him in fee, to whom the defendant attorned, &c. Whether the defendant may plead *ne granta pas per le fait*, or, *riens passa per le fait*, and give in evidence that he never attorned to the plaintiff? SHELLEY thought that he ought to traverse the attornment; but KNIGHTLEY and FITZHERBERT thought well, that he might do either the one or the other, if it be true that he never did attorn (a).

(215) 4. Co. 71. b. If nothing passes by letters patent of the king, a man may plead *non concessit per literas patentes*. M. 33. & 34. Eliz. B. R. [Cro. Eliz. 259.] Gourney and his wife in debt for the performance of covenants against Sir Edward Cler, and it was pleaded in bar, that the grantee of a rent-charge had granted it over, and issue taken upon it, and found for the defendant, and moved in arrest of judgment, that no attornment is shewn, and by three Judges, it is good, and well aided by the statutes of Jeofails; and although issue might be taken either upon the grant or upon the attornment, yet the issue upon one being found, the other is implied.

(a) Attornment rendered unnecessary by 4. Ann. c. 16. §. 9. Dougl. 282,

In a *formedon* for a rent charge, if the tenant plead joint-tenancy in parcel of the land, the writ shall abate for the whole.

[3. Leon. 92. 2. Leon. 161, 162. acc. Dy. 291. Cro. El. 739. Ld. Raym. 280.]
Dal. 106. *S. d. vide* Dal. 75. Dier, 84. 3. 9. E. 3. 21. a. 13. F. Avowry, 206. N. B. 178. a. 32. 1. 22. 3. 17. 31.

(216) **A** FORMEDON was brought of a rent charge issuing out of two acres of land. The tenant pleaded joint-tenancy of one acre with a stranger. Whether this plea goes in abatement of the whole writ? was the question. And SHELLEY and FITZHERBERT thought, that it was a good plea to abate the whole writ, inasmuch as in rent charge demanded it is necessary to name all the tenants of the land out of which, &c. but of rent service it is not so, for that may be demanded against a pernor, &c.

Aff. 10. 10. 10. 18. 10. 31. 6. Co. 58. 22. H. 6. 24. a. F. Affize, 456.

(217) MOUN-

(217) **M**OUNTAGUE asked the advice of the Court in the joinder of an issue; where the case was, That in debt on bond with a condition to perform all covenants in a certain indenture, there was in the indenture one covenant, "*that the defendant should do, and permit to be done, all things for assurance of the plaintiff in certain land, which should be devised by counsel for the plaintiff, if he should be thereto required;*" and the defendant, *protestando* that the counsel for the plaintiff did not devise any thing, for plea said, *that he was not required, &c.* The plaintiff replied, "*that I. S. his counsel devised that the defendant should release all his right, &c. wherefore he caused a release to be made, (and shewed it in certain;) and required the defendant to seal it, &c. and he refused so to do.*" and the defendant rejoined, *that he did not refuse, prius.* (218) And the Court said, that that would be a plain jeofail, inasmuch as he waives his bar, i. the request, which he ought to maintain, viz. to say that he was not requested. But it was said, that there was no need for the plaintiff to have spoken of the refusal, inasmuch as the defendant had pleaded in the negative, that he was not requested; and it is sufficient for the plaintiff to say, that he requested him after the devise and release made, without more, and then they are at issue, &c.

Debt on bond to suffice, if required, such assurance as counsel should advise. Plea, *protestando* no advice, says, that he was not required. Re-plication, advice of a release, and a tender of it, and refusal to seal it. Rejoinder, that he did not refuse, is a departure.

Co. Litt. 126. a.

21. H. 7. 25. Pl. 105. b.

[Bac. Ab. Pleas (1). Com. Dig. Pleading (F. 7. 11.). 2. Will. 96. 4. Term Rep. 585. 504.]

8. El. 253. b. 6. H. 7.

4. 7. H. 4. 30. b.

Dier, 371. a. 1. Inst.

304. a. 28. Aff. 48.

Cro. 175. a. 4. Leon.

79. 168. Hob. 198.

Yelv. 152. 5. H. 7.

220. 26. b. 27. H. 8.

6. a. 36. H. 6. 15. a.

Pl. 172. Br. Maintenance de Brief, 14.

(219) **N**OTE. It was holden clearly by all the Judges, that after regrefs made by the disseisor, the disseisee shall have the corn of the disseisor, although they be severed by the disseisor; as it was also adjudged but lately upon good consideration in *B. R.* in *† Saye's case*.

After regrefs made, the disseisee shall have the corn, though severed from the land by the disseisor.

Mo. 24. 1. Inst. 55.

5. Co. 85. a. 11. Co.

51. b. 52. a. 5. 12.

1. El. 173. a. 27.

[See Mr. Hargrave's note (11) to Co. Litt.

H. 7. 16. 25. 12. 14. 15. E. 4. 5. b. 31. & 32. a. H. 7. 1. b. 37. H. 6. 7. b. 1. El. 173. a. 27. Aff. 1. a. 27. H. 6. 1. a. 43. 46. E. 3. 6. b. 32. b. 55. b.]

Fine or recovery bars the heirs of tenant in tail male, but is no discontinuance, nor affects the reversion being in the king.

Hob. 332, 3. Plow. 555. a. 2. 6. Co. 16. a. 55. a. 1. Leon. 8. 171. 85. 1. Anderl. 171. Mo. 251. 553. a. 2. Co. 52. a. 25. E. 3. 48. a. Plow. 553. B. N. C. 144, 5. Br. Fines Levy, 121. B. N. C. 177. 224. Vide stat. 34. H. 8. c. 20. Title Recovery, 4. Br. Recovery in Value, 31. [See Cruise on Recoveries, 255. to 270. and the cases cited, and on Fines, 175.]

(1) **T**ENANT in tail to him, and his heirs male, the reversion being in the king, suffered a common recovery, or levied a fine.—SAY, of *Lincoln's Inn*, asked the Judges, Whether his heir should be barred, or not? And they were of opinion, that it was a bar to the heir, although it would not be a discontinuance of the tail, nor is against the king as to the reversion. And **ENGLEFIELD** said, that he had been concerned in this case, and that upon mature consideration it was holden that he should be barred; but **SHELLEY** doubted.

(1) *H. 5. Car.* In chancery, between the *Earl of Nottingham* and *Lord Munsford*, it was resolved, that if a tenant in tail of the gift of the king levy a fine and suffer a recovery, the estate-tail is not barred, for the statute 34 & 35. H. 8. [c. 20.] saves it: but otherwise if the king for money make a gift in tail, by **COVENTRY**, **HIDE**, and **RICHARDSON**.

Under plene administravit the executor shewing debts paid, must shew them paid before the commencement of the action; but judgment against him shall be *de bonis testatoris tantum*.

11. 20. 5. H. 7. 12. 2. b. 27. b. Dr. and Stud. 76. 7. 9. 2. E. 4. 12. a. 4. a. Dier, 80. a. 208. a. 232. a. Cro. 51. a. 63. 9. 5. Co. 82. b. Vaugh. 5. Plow. 279. a. 48. E. 3. 21. b. 2. H. 4. 22. b. Fitz. Executors, 68. 35. 1. Roll. Ab. 426. 924. Wentw. 205. [3. Term Rep. 688. 1. Term Rep. 690. 2. Black. Rep. 1105. Bac. Ab. Executor (M.). Com. D.g. Pleader (2. D. 15.).]

(2) **I**N debt against an executor who pleaded *plene administravit* it was given in evidence at the trial by the defendant, that he had paid divers debts upon contracts made by his testator; upon which the plaintiff demurred in law. And now **MOUNTAGUE** demanded judgment for the plaintiff. And the Judges thought there was no reason for delaying it, inasmuch as he was not compellable to pay such debts. And admit that the creditors had bonds for them, yet inasmuch as the defendant hath not said that he paid these debts *before that writ purchased*, (for if he paid them pending the writ, that is not a good administration to bar the plaintiff, by **BALDWIN**,) they agreed that the judgment should be entered, and that it should be only *de bonis testatoris*, no more than if it were found by verdict. *Quod nota.*

(2) *M. 4. Eliz.* Adjudged, that if an executor pay a just debt after a writ sued out, and before notice of it, or summons first served, there it is a good plea; but otherwise if it be a debt of record, for he ought to take notice of that at his peril. [1. Term Rep. 690.] *M. 33. & 34. El.* It was holden, that if an executor plead *non est factum*, and it is found against him, he shall only be charged of the goods of the testator: otherwise is it where he is sued in another court.

(3) **C**ERTAIN persons were seised to the use of an husband and wife before the statute; and now a writ of entry in the *post* was brought against the husband, and he pleaded joint-tenancy with his wife.—MOUNTAGUE put this question: *Whether it be necessary to make mention of the statute of extinguishment of uses* [27. H. 8. c. 10.] *which makes them joint-tenants?* (4) And the Court thought that it was necessary to shew the statute, for at common law, when the tenant pleaded joint-tenancy with a stranger, it was necessary to shew by whose seoffment; wherefore, &c. Then MOUNTAGUE asked further, *Whether the demandant may aver the husband sole pernor of the profits?* And the Court thought, that all pernancy of the profits is clearly gone by the statute. *Quære.*

On a writ of entry in the *post* brought against a man after the statute of uses, who before the statute was a *cestuy que use* with his wife, if he plead joint-tenancy with her he must shew the statute.

All pernancy of profits of the land is taken away by the statute 27. H. 8. c. 10.

1. Ander. 187. b. Co. Litt. 187. a. b. 10. 14. 21. 19. E. 4. 2. a. 26. 76. a. 9. b. 12. 19. 22. 12. 36. H. 6. 26. b. 32. b. 7. 4. 2. 6. b. 15. 12. H. 7. 9. b. 26. b. 24. H. 4. 15. b. Plow. 53. 55. 84. Plu. Manxell's case, 1. Co. 239. 224. 5.

(5) **I**N an action upon the case the plaintiff was nonsuited at the trial; wherefore the defendant, by the statute made 23. H. 8. [c. 15.] had judgment to recover his costs: and afterwards the record was removed by error into the king's bench by the plaintiff, pending which undetermined, the defendant brought an action * of debt in the common pleas upon a new original, and declared upon the record of the action upon the case. And this matter was pleaded by the defendant, &c. And the better opinion of the Court was, that the action was maintainable, because it is brought upon a new original. (6) And if the record be denied, *C. B.* cannot write to *B. R.* because it is the superior court; but the record shall be certified into chancery by *certiorari*, and sent in by *mittimus*; but if it were an inferior court, this Court might write to it. See the like, 18. E. 4. [6. pl. 33. 7. pl. 4.] and afterwards in the same Term, judgment was given that it was no plea. And FITZHERBERT and BALDWIN held, that although the record be reversed, yet the plaintiff shall have the costs which were assessed by the

Pending a writ of error upon a non-suit in *C. B.* the defendant may sue for the costs recovered in the original action; and he shall have them, though the judgment be reversed.

* [32. b.]

Bendl. 12. Damages, 6. 10. H. 6. b. b. Noy. 3. Inst. 139. 3. Bullf. 248. 4. H. 6. 31. a. 17. 18. E. 4. 4. b. 7. H. 6. 18. b. 22. H. 6. 38. b. Br. Executor, 136. 284. Cro. 207. b. 4. H. 6. 23. b. 19. H. 6. 19. a. 39. H. 6. 5. al. debt, 133. 1. Cro. 175. 297. Moor, 625. 13. H. 7. 20. b. 2. Eliz. 187. a. 22. E. 3. 75. 20. E. 3. *Sive facias*, 123. 11. H. 6. 17. 8. E. 4. 25. 22

(6) *E. 17. Jac. B. R. & Elisdem v. Bennet.* In an action upon the case for words, the plaintiff was nonsuited at the trial, and he moved that his declaration was bad, & save costs upon the statute 23. H. 8. c. 15. and 4. Jac. c. 3. but it was adjudged, that for his vexation he should pay costs, although in fact he could never have had judgment if the verdict had been found for him.

Easf. 1. Car. B. R. Ruled, that after judgment reversed, debt does not lie for the costs given upon the first judgment. [Sayer on Costs, 209. 4. Bac. Ab. 680, 681.]

15. E. 4. 21. a. Dyer,
25. 8. Co. 143. b.
[1. Hen. Bl. 432.
4. Term. Rep. 436.]

discretion of the Court, because of the wrong and vexation of the suit. But ENGLEFIELDER doubted of that. The matter was entered *M.* 25th of the present king, Rot. 456. but it was never argued.

To a demise of twenty-six acres, plea that the twenty-six acres were demised, and four acres more, traversing the twenty-six acres only, the verdict found a demise of only twenty-one acres, Whether the plaintiff shall recover? *Qu.*

1. Leon. 44. 9. Co.
14. 8. 13. H. 7. 5.
25. 2. 8. E. 4. 27.
20. 35. H. 6. 38. a.
Fitz. Account, 58. 114.
B. N. C. 460. 9. El.
260. a. 14. Aff. 11.
22. E. 3. 16. b. 2.
3. Co. 4. 42. Plowd.
92. 9. H. 7. 3. Dier,
147. a. 75. 132. b.
Fitz. Verdict. 26, 27.
35. 8. 11. H. 4. 21.
b. 40. b.
[Bull. Ni. Pr. 298.]

Hob. 54. 47. E. 3. 19. a.
28. E. 3. 95. 22. E. 4.
b. 18. E. 3. 15. a. 30.
E. 3. 5.

2. Rol. Ab. 69r. 9.
Co. 69. 15. E. 3.
Aff. 94. Register, 188.
Ro. 188. 13. E. 3.
53. Verdict. 25. 32.
H. 3. Bro. Travers.
per fascico, 33. 3. E. 4.
17. b. 11. H. 6. 50.
a. 28. Aff. 38. 17.
5. Co. 30. b. Hob. 80.
53. 1. Sid. 405. 1.
Saund. 209.

[Sir T. Raym. 175.
1. Lev. 263. 2. Keble,
467. 470.]

(7) **I**N debt the plaintiff declared that he *demised twenty-six acres of land* to the defendant, rendering yearly forty shillings, for a term of years, and for the rent arrear he brings the action; the defendant pleaded *that the plaintiff leased the said twenty-six acres of land to him, and four acres more*, paying the aforesaid rent, *without this* that he demised the *twenty-six acres only*; upon which they were at issue. And the verdict was, that the plaintiff *demised only twenty-one acres*; and, Whether the plaintiff should have judgment upon this verdict, or not? was the question.—(8) FITZHERBERT and ENGLEFIELDER thought that the plaintiff should recover, for in that the verdict found that the plaintiff demised *twenty-one acres only*, it is a void verdict in this part; for it is admitted and confessed on the part of the defendant, that *twenty-six acres* were demised as he declared; and they ought not to find contrary to what the parties have agreed, for their charge was no more, than whether the *four acres more* were leased, or not; and they have not found that *the four acres more* were demised; *ergo*, they have found against the defendant.—(9) BALDWIN and SHELLEY, *à contrà*. For the issue is found as well against the plaintiff as against the defendant; for the plaintiff has laid the cause of his action upon a lease of twenty-six acres, and upon that he intends to recover. But SHELLEY thought that if the issue and the plea had been well pleaded, the plaintiff might have recovered upon the verdict: for the plea is not good, because it is not necessary for the defendant to take a traverse in this case, inasmuch as he hath confessed it, and more, and then the traverse should come from the part of the plaintiff, *s.* without this that he demised the aforesaid four acres, &c. And then their charge shall be only upon the surplus, that is the lease of *four acres*; but here their charge is upon the entirety, &c. But he wished to consider it.

This opinion of SHELLEY was affirmed in C. B. as to the traverse.

* (10) **A** LEASE for years was made of a meadow by which the river *Exe* runs, by deed indented; and the lessee covenanted to *sustain* and repair the banks to prevent the water from overflowing, upon pain of forfeiture of ten pounds. And afterwards, by reason of a great, outrageous, and sudden flood, which happened lately by reason of the subversion of the weirs in *Devonshire*, the banks were decayed and perished, &c. (11) And by the opinion of FITZHERBERT and SHELLEY the law is, that the lessee is excused from the penalty; as if it were of an house which is burnt by lightning, or overturned by the wind, because it is the act of God, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, because of his own covenant.

Under a covenant by lessee with a penalty to *sustain* and repair the banks of a river, he is not subject to the penalty for a damage by sudden inundation, but is bound to repair it in convenient time.

12. H. 4. 5. b. N. H.
59. N. 680. 206. a.
1. Inst. 53. a. b. 2.
Inst. 303. 10. Co. 139.
b. Pl. 29. a. Dr. and
Stu. 66. b. 12. H. 2.
1. b. 15. H. 7. 1. b.
33. H. 6. 1. a. Plow.
29. a. 12. H. 4. 7. a.
17. E. 3. 65. a. Perk.
142. 6. H. 7. 12. a.
Dy. 234. a. 29. E. 3.
33. a. 40. 43. E. 3.
6. 6. Dy. 5. 67. a.
8. E. 4. 2. Allyn. 27.
[2. Str. 763. 1. Term
Rep. 710. 310.]

(12) **T**HE custom of *London* is, That a man may devise his purchased land in mortmain. And a purchaser devised by his will, that the prior and convent of *Saint Bartholomew in West Smithfield* and their successors should have the lands, so as they paid annually to the dean and chapter of *St. Paul* sixteen marks: and if they should fail of payment, that their estate should cease, and that the said dean and chapter and their successors should have it. And for a breach of the condition, they of *St. Paul's* entered. And to FITZHERBERT and BALDWIN it seemed clear, that the condition is void, for it cannot continue after the fee-simple given, for the feoffor has determined his right and interest, and then

A remainder limited by will upon an estate in fee, determinable on the failure of payment of rent to a stranger *who should then have it*, is void as to the stranger, but the heir may enter for a breach of the condition.

[Law and Cust. of Lond.
13.]
Co. 85. b. 1. Rol. Ab.
55. b. 5. 11. H. 7.
19. b. 17. and 21. a.
3. Bult. 6. Bridg.
135. 1. Cro. 58. 577.
2. Leon. 114. Dy.

(12) M. 41. and 42. Eliz. B. R. *Fulmerston v. Steward*, [cited in *Pells v. Brown*, Cro. Jac. 598.] Land is devised to one and his heirs, upon condition that for non-performance *B.* should have it in fee; adjudged that the remainder is a limitation, and that the limitation over to *B.* upon an estate in fee is good, and that *B.* should have it upon the non-performance. And POPHAM and FENNER said, that it was so agreed by all the Judges in the case of *Chanteries* [post. 368. a. b. 4. Leon. 156.] entered 38. Eliz. Rot. 867.

E. 3. Jac. C. B. In the argument upon *Doyle's* case, HUTTON, *Serjeant*, put this case, as having been adjudged in C. B. M. 37. and 38. Eliz. Rot. 1149. between (a) *Corwood* and *Cowlind*. *John Parker* devises lands in *Kent* to *Richard* his second son, and his heirs, and if he die before twenty-one years of age, [or without issue,] then he devises it to his other son; *Richard* enters, and has issue a daughter, and dies before twenty-one years; and adjudged that the daughter shall have the land.

E. 36. Eliz. B. R. *Gibbons and Warner*. *Sir Edward Clerke's* case on the will of *Sir Richard Fulmerston*, by POPHAM and CRAWLEY; the reversion in that case is good, and this book not law. [2. Rol. Rep. 425]

(a) This is certainly the case of *Soulle* | *without issue*, by mistake left out. See
v. *Gerrard*, Cro. El. 524. and the words, or | *Cowp.* 234. 410. *Dougl.* 321.

the

127. b. 4. 122. 128. the stranger cannot enter for the condition broken, but the
 a. 2. Roll. Rep. 216. heir may.
 11. H. 6. 13. b.
 D. S. 95, 96. 1. Vaugh. 271. 2. And. 416. Dier, 317. a. N. B. 201. I. 18. H. 8. 3.
 Plow. 25. a. Hutt. 60. 18. El. 348. b. 43. Aff. 44. Finch. 46. b. 55. b. in one special case.
 Com. 8. 1. 10. Co. 95. b. 85. 42. b. Plow. 85. b. Litt. 8. b. [See a note 1. by Ld. Nott, MSS. 10
 Co. Litt. 213. b. and 3. Atk. 139, 140.]

The reversioner makes
 a feoffment with livery,
 the termor being upon
 the land, Whether this
 be good? *24.*

a. Rol. Ab. 4. Moor,
 11. 42. 48. Ante, 18.
 b. 20. El. 362. b.
 2. Aff. 1. 5. Aff. 8.
 5. Aff. 12. 7. E. 3.
 23. Fitz. Feoffments,
 70. 8. E. 1. Aff.
 418. Dy. 337. b. 33.
 H. 6. 42. a. 3. Mar.
 131. a. 19. H. 6. 5. b.
 a. Co. 31. b. 22. E. 4.
 38. Perk. 45. a. 27.
 Aff. 8. 3.

[4. Ann. c. 16. § 9.
 Dougl. 282.]

* [33. b.]

Dy. 251. b. Moor.
 11. 21. H. 7. 7. a.
 46. E. 3. 25. b.
 Bao: Surrender, 48.

[Vin. Ab. Surrender,
 E.]

(13) A LEASE was made for a term of years rendering
 rent; the lessor made a feoffment of the land, the
 termor being upon the land, and the termor occupied the
 land: Whether the feoffee should have the freehold and the
 rent, or not? was moved.—SHELLEY thought the feoffment
 good, for the termor has interest in his chattel, and the lessor
 has interest in the freehold, and so it is a distinct interest,
 and the freehold may pass, and the term be saved; but other-
 wise is it of a lease for life, for there the lessor has no title to
 the freehold.—(14) BALDWIN and FITZHERBERT thought
 that nothing passed by the feoffment, if the termor did not
 agree to it, for the lessor has nothing to do with the possession
 during the term; and the livery and seisin are nothing but
 a gift of the possession, which the lessor cannot make without
 wronging the termor; and for this the common doctrine
 must be allowed, viz. that the lessor must grant the rever-
 sion, and the termor attorn.—And BALDWIN said, That if
 the feoffment be made, the termor agreeing * to it, the term
 and rent are gone, for that is a full surrender in law of his
 term. But FITZHERBERT denied this: (15) for the termor
 has an interest which cannot be surrendered without his
 consent to surrender. For in 5. Hen. 7. the termor gave
 his permission to his lessor to make the livery, and he made
 it; and that was held no surrender of his term, for his
 intention to surrender does not appear: but if the feoffment
 be made by the agreement of the termor, that is as much as
 if the termor had granted all his interest to the feoffor for a
 day, or an hour, or for the space and time of livery of
 seisin, and no longer; and then the feoffment shall be good,
 and yet the termor shall have his term again, and the rent
 revive. (16) And in 9. H. 6. [16. b.] the lessor made the
 feoffment by agreement of the termor, and there the opinion

(14. & 15.) Lessee for life delivers seisin upon a letter of attorney, that is not a sur-
 render, by PERIAM, M. 31. & 32. El. C. B. in *Trevillian's Case*, Rot. 2908. [4. Leon.
 195. 1. And. 247.]

is, that the feoffee shall have the rent. But they all in a manner agreed, that if the lessor oust the termor against his will, and make the feoffment, although the termor re-enter, the rent is extinct; for the land was discharged of the rent in the hands of the feoffor, and in the hands of the feoffee it shall not be revived, any more than if the lord disseise his tenant, and make a feoffment, although the disseisee enter, the feoffee shall not have the seignior; wherefore, &c.

(17) **KNIGHTLEY.** There is a difference between the cases; for in the case of the lord, where the tenant shall re-enter, he leaves nothing in the person of the feoffee, but wholly defeats his estate, but in the other case he leaves the reversion and the freehold in the feoffee; wherefore they are not similar, &c.—And **SHELLEY** thought that the lessor may make a feoffment, if he be within view, the termor being in possession and not privy to it, and the freehold and fee-simple may well pass, and the rent also: but the case deserved a serious consideration, and the point of law was well worth arguing.—And **MOUNTAGUE** said, that they meant to demur in law upon the case. *Ideo quære.*

Extinguishment, 4. Supra, 31. a. Post. 212. b. 5. H. 7. 12. An. 6. Co. 70. cont. 5. H. 5. 12. Moor, 281. Inf. 319.

11. 21. H. 7. 13. a. and 20. b. 3. a. 41. E. 3. 18. b. F. Avowry, 231. 14. H. 4. 8.

19. H. 6. 45. b. 9. H. 7. 25. 4. 50. E. 3. 10. a.

Litt. 12, 13. B. N. C. 307. 7. E. 4. 20. 11. H. 4. 71. 2. Co. 32. a. Dy. 112. b.

[Co. Lit. 48. b. 49. a. Bac. Ab. Feoffment, (B. 2.). Com. Dig. Feoffment. (B. 7.)]

(18) **ONE** of the clerks in chancery was sued in *C. B.* in an action of debt, and process continued till the exigent. And the defendant, being such clerk, sued out a *superfedeas* to the sheriff *quia improvidè*, and afterwards sued a writ of privilege out of chancery, directed to the Justices of the bench, reciting the privilege of chancery, and requiring the Judges to surcease. And it was well argued, Whether he should have his privilege or not? (19) And at last the privilege was disallowed, and the clerk driven to answer, for the Court was legally in possession of his plea by the act of the defendant himself; for inasmuch as he hath sued out a *superfedeas quia improvidè*, he has well affirmed the jurisdiction of the Court; for every *superfedeas quia improvidè* recites the defendant's appearance in court * by attorney, and shews his name; that therefore is his own default; but if he had not sued out this writ, notwithstanding the exigent, the privilege should be allowed: and for this

A clerk in chancery, by suing out a general *superfedeas* to an exigent, forfeits his privilege,

Moor, 34. Noy, 40. 2. Rol. Rep. 294. 3. H. 6. 30. a. 9. E. 4. 53. a. 11. H. 4. 68. 12. H. 6. 7. 3. E. 4. 15. Reg. 18. 11. 30. 35. H. 6. 8. 30. 12. Dy. 328. a. 19. H. 6. 1. b. 10. H. 7. 13. b. 10. 16. E. 4. 4. b.

* [34. a.]

[Vin. Ab. Privilege (1.). 2. Wilm. 321.]

20. H. 6. 26. a.

(18) See the Case of *Higg* and *Harrison* [Style's Rep. 413.], entered *Trin.* 1653. Rot. 911. and in my notes it is in the Book of the year 1653, p. 108. b.

Dyer, 287. a.

precedents were shewn: and then after the writ of privilege came to the Justices, they ought to have issued a special *superfedeas* of the outlawry to the sheriff, reciting the writ of privilege. And so note well the distinction.

Bellengeham's Case.

Upon a pardon of outlawry on an appeal of murder, defendants need not have a *scire facias* against the lords mediate and immediate, but only against the appellant.

If such pardon vary from the indictment in the additions, defendants must aver that they are the same persons.

The words in the pardon, "we pardon to A. and B. all outlawries, &c. against them, or either of them, proclaimed, &c." are sufficient, without saying "to A. and B. and to each of them."

16. E. 3. F. Outlawry,
48. 2. R. 3. 8. b.
9. H. 7. 5. b. Bro.
Scire Facias, 194. 4.
E. 4. 10. 4. 7. 21.
H. 7. 3. 5. 21. b.
Stamf. 104. 3. Aff. 6.
Cro. 58. a. 21. H. 6.
21. b.

[2. Hawk. P. C. 545.
554. but see 2. H. H. P. C.
209.]

Stamf. Prerog. 102. b.

Mutt. 89.

(20) **I**N the King's Bench two were outlawed upon an appeal of murder, and purchased their charter of pardon, and had a *scire facias* against the plaintiff in the appeal, and also a *sci. fa.* against the lords mediate or immediate; (*sed quære si de rigore juris*; for SPILMAN and PORTMAN thought there was no necessity to have that against the lords, for the attainder is affirmed by the suing out of the charter of pardon, and not reversed, &c.) and note, that the pardon did not agree with the indictment in the additions; wherefore the Judges doubted whether to allow the pardon; but the parties made an averment that they were the same persons that were indicted. And the exception was taken by JAMES DYER for the king, that the charter was insufficient; (21) for the words were, "we have pardoned, remitted, and released to William Bellengeham of London, servingman, &c. and Lawrence Bellengeham, late of London, yeoman, all and all manner of outlawries against the said William and Lawrence, or against either of them, proclaimed;" which charter in the premises, s. in the words of pardon, is joint, where it should have been, "we have pardoned, &c. to W. B. and L. B. and to each of them, &c." because each felony is several, and for those several contumacies it is requisite to have several pardons; and although the sequel be "against them or either of them," that does not make the pardon several; wherefore, &c. (22) And so is the case ruled in 22. E. 4. [7. b.] that such pardon was not good; but there the case varies from this; for the charter was, "we have pardoned to A. B. and C. all felonies by them or any of them done and perpetrated:" but quære if it were "any one of them," &c. And on account of that case the Judges were doubtful, and sent by BAKER, Attorney-general, who went to the common pleas, and asked the advice of the Judges there, who were of different opinions: but at last the Judges of the king's bench ordered the precedents

cedents to be searched; and such pardon was allowed in the same year, 22. E. 4. Term, Rot. 19. And it was the case of *Wingfield*, and so the case is misreported and contrary to the record; wherefore without further argument the aforesaid pardon was allowed also: *quod nota*.

[2. Hawk. P. C. 548.]

Bro. Charter de Pardon,
51. Hal. Pl. 254.

* Soper et Ux' v. Ludlow

* [34. b.]

(23) JOHN SOPER and Alice his wife brought a *sci. fa.* against Ludlow to have execution of a recovery in a writ of dower had in the 22d year of the now king; in which record it appears that the demand was of six houses, one hundred acres of land, &c. in Littleton and Stanwell, "in the county of Middlesex;" to which the tenant pleaded as to one third part of the said tenements in Littleton, of which, &c. that he could not deny the action, &c. wherefore judgment was given, that the plaintiffs should recover seisin of the third part of the tenements in Littleton; and as to the tenements in Stanwell, pleaded to issue, which the demandants afterwards relinquished, and prayed execution of the land in Littleton. (24) And upon that record, by the advice of the Judges and prothonotaries, a special *sci. fa.* was sued out, reciting the record as it was pleaded, commanding the sheriff to garnish the tenant to shew why the demandant should not have execution of a third part of the aforesaid tenements in L. for it does not appear by the record, how many of the houses and acres are in one vill, and how many in the other. And the demand and the pleading in the aforesaid form are well enough. But ENGLEFIELD thought, that the tenant in his plea ought to have set out the certainty of that whereof the demandant ought to have execution; but others thought the contrary: wherefore, upon default of the tenant, the demandants had execution upon a *scire feci* returned by default, and had a special writ of seisin, &c. And JAMES DYER drew the *sci. fa.* and was counsel for the demandants in the matter.

Dower for one hundred acres in L. and S. judgment was for that part in L. only. The writ of seisin must be special, as the quantity there is uncertain.

32. H. 6. 6. b. 9.
H. 7. 4. a. Reg. 185
Rot. 185.

2. Keb. 250.

3. Cro. 463

[5. Burr. 2673.
3. Wilk. 49.]

Inf. 34.

(24) E. 38. Eliz. B.R. In *ejectione firmæ*, Marmaduke Thomas against Richard Kenn (a), upon a title to land in the tenure of Sir Hugh Portman and Morgan, the declaration was of one hundred acres of land in D. and S.; and upon not guilty pleaded, the jury found that the defendant ejected him out of ten acres only, and did not shew them in certain; and adjudged a good verdict, and the plaintiff had judgment.

(a) [Reported in Lit. Rep. 217. and | pear to have been determined there.]
Hedl. 67. & 97. but this point does not ap-

Morice v. Leigh.

Whether delivery to the obligee himself as an escrow makes the deed absolute?

2. Rol. Ab. 27. 1. Rol. Rep. 27. Perk. 29, 30. 16. Aff. 18. B. Faits, 56. 14. 18. E. 4. 2. b. 28. a. b. 11. H. 7. 16. 14. H. 8. 22. b. 8. 10. 14. 19. 27. H. 6. 26. 25. 1. b. 58. a. 7. a. 27. H. 8. 12. b. 43. E. 3. 29. a. Dy. 95. b. 19. H. 8. 8. a. 1. Eliz. 167. b. Co. 9. 197. a. 3. Cro. 35. 1. Inst. 36. a. Hob. 246. com. Moor, 642. Post. 167.

[Shep. Touch. 56. 2. Mod. Ent. 298. Cro. Eliz. 835. 884. 520. Cro. Jac. 85, 86. 6. Mod. 218.]

* [35. a.]

(25) *H. 33. Eliz.* C. B. between † *Berry* and *Robins*, adjudged no plea; and so was † *Knowles's Case*, adjudged *H. 36. Eliz.*

† It should seem the law is not so, for by delivery to the plaintiff it was a perfect deed, and the speaking of the escrow void; and 34. *Eliz.* JUSTICE GAWDY seems to agree with FITZHERBERT and SHELLEY. *Nota*, 9. Co. 137. b. Ruled in *Thorowgood's Case*, that delivery of the deed to the plaintiff himself makes that his obligation, notwithstanding he deliver it as an escrow, &c. 19. *H. 8. 8. a.* 1. Inst. 36.

Livery to one of several feoffees in the name of all, is bad, without a deed of feoffment.

22. H. 6. 1. 5. Co. 95. a. 40. E. 3. 41. a. 28. H. 8. 14. a. 18. E. 4. 12. a. 33. H. 6. 17. a. 10. 15. E. 4. 1. a. 18. a. B. N. C. 89. 341. [Co. Lit. 48. a. 49. b. Sheph. Touch. 215.]

The feoffee of the comisor of a statute-merchant may have an au-

(26) NOTE, That it was agreed by the Judges, that if a man enfeoff several, and make livery to one in the name of all, that is not good without a deed of feoffment.

(27) A MAN acknowledged a statute-merchant before the mayor of *Chester*, where it was supposed in

(27) The statute 23. H. 8. c. 6. provides only for the two chief justices and the mayor of *London* and *Westminster* [See 8 G. 1. c. 25.].
Audita Querela, B. 1. upon Matter in Deed.

fact, that the mayor had not authority committed to him to take statutes for the king; as the act concerning it has provided for in *London* and other considerable cities; and the conusor made a feoffment to a stranger, and the conusee sued out execution, and the feoffee brings *audita querela*.

dita querela against the conusee taking out execution, where the mayor before whom it was acknowledged is supposed not to have authority to take it.

Stat. de Act. Burn. Raft. Recog. 1. 2. E. 6. c. 31. 17. Aff. 24. 2. Bult. 14. [Cro. Eliz. 233. 319. Sir W. Jon. 90, 91.]

(28) **M**ARVYNE put this question: A man recovers in a writ of entry in the *post* against the tenant in tail upon a voucher, and recovery in value against *Webster* the common vouchee; and before execution sued, the tenant in tail dies, and his issue enters: Whether the recoveror may enter, or not? And FITZHERBERT and BALDWIN thought that he may well enter upon the issue, for the issue cannot falsify this recovery, because of the recovery over in value; as if he should suffer a common recovery against tenant in tail without a recovery over in value.—SHELLEY *à contra*, for the issue in tail is remitted by the death.

Upon a recovery against a tenant in tail with recovery over in value, if he die before execution, the recoveror may enter upon the issue in tail.

1. 10. Co. 106. 38. a. Moor, 14.

7. H. 4. 17. 1. Inf. 361. b. Plo. 14. b. 12. E. 4. 19. b. 20.

23. Eliz. 376. b.

[Cruise on Recoveries 200.]

(28) But if tenant in tail die without issue before execution sued, and he in remainder enter, Whether then execution beuable or not against him? *querre*; because when the tenant in tail is dead † *without* issue, he in remainder shall never sue execution of a thing recovered in value, and consequently shall not be bound. This was much debated in *East*. 23. *Eliz.* C. B.

If execution be sued in the life of tenant for life, no remitter; but if no execution during his life, the heir may enter. 7. H. 4. 17. b. Bro. Remitter, 9.

† Orig. *fi*.

(29) **T**HE patron of a church granted *the next advowson* to one; and afterwards he granted *the next advowson* to another; MOUNTAGUE put the question, Whether the second grant be void, or not? And FITZHERBERT

Whether where the patron grants *the next advowson* to one, and afterwards grants *the next advowson* to another, the second grant is void? *quæ*.

(29) 22. *Eliz.* in C. B. by all the Judges and Serjeants, that the second grant of the next avoidance was void; and RHODES shewed a judgment in the point put there by DYER; and agreed, that in the case here put, where the parson grants the next avoidance, it is good, and the grantee shall have the second avoidance.

M. 42, 43. C. B. Rot. 3613. between † *Williams* and the Mayor and Commonalty of *Beauford*.

Adjudged that the second grant is void between † *Tomson* dean of *Windfor* and *Jackson*, Trin. 4. Jac. Rot. 3338.

Com. 249. a. By ANTHONY BROWN, *Justice*, the king shall be bound to the next avoidance, &c. [See the cases there put by WESTON and denied by A. BROWN, *Justice*.] Where a man leases to one for twenty years, and afterwards on the same day makes a lease to another for twenty years, the second lease is void. Plo. Com. *Bracebridge* and *Cook's Case*, 421. a. and *Smith and Stapleton's Case*, 432. a.

22. & 23. *Eliz.* A man grants the next presentation to one A. and afterwards grants the next presentation to the same A. that is a surrender of the first grant. See 5. Co. 11. b. *Ive's Case*.

Co. Litt. 378. b. Br.
Presentment al Eglise,
52. B. N. C. 13. 3.
Cro. 791. Hutt. 105.
43. Aff. 35. 28. H. 8.
26. a. 7. Co. 28.

thought it void, for he grants a thing which he has not; for it could not be the *next advowson*, because he hath granted that to another. And such a grant was very lately holden bad here.—SHELLEY, *à contrâ*, for both grants may take effect; for the law will say that the last grantee shall have the next avoidance which lawfully belongs to the grantor, and that is the second avoidance. As if three co-parceners make an agreement to present by turns, the first presents in her turn, and then grants the next avoidance to a stranger, the second co-parcener will say that this grant is void; and indeed, according to the words of the grant, the grant cannot take effect, because the next avoidance belongs to the second sister, but yet the grantee shall have the third avoidance, * for that is the next avoidance which she can lawfully grant. (30) And this case is in 15. Hen. 7. [7. a.]

* [35. b.]

2. Anderf. 175. Perk.
331, 2. Inst. 379. a.
19. E. 4. 1. B. 2.
Quare Impedit, 135.
14. 25. H. 7. 27. 7.
Co. Litt. 378. b. 3.
Cro. 791.

in the case of *quare impedit*. A man seised of an advowson has a wife, and grants the third avoidance to one I. S. and dies; the heir shall have the two presentations, and the wife as tenant in dower the third, and I. S. shall have the fourth. And the first case is ruled in 4. 18. E. 3. that the second grant is not void; but perhaps he may grant it so specially that the second grant shall be void; as if the grant be of the next advowson after the death of the incumbent, and name him, these it must be of the next, or none, (31) FITZHERBERT denied the case of co-parceners, and no difference between the next advowson and the next presentation; and it cannot be the next presentation when another has all the presentation; but perhaps a little more would make the grant good; for instance, if it were, *I have granted my advowson*; for there it cannot be understood otherwise than of that advowson which he could lawfully grant. *Quare*, what difference?

19. E. 3. Fitz. Quare
Impedit, 154. Winch.
96, 7.

(30) M. 9. Jac. C. B. By CHIEF JUSTICE HOBART and HUTTON, the grantee shall have the next avoidance after the endowment of the wife, because the endowment of the wife is an act of law. And the principal case was, One granted the next avoidance; the incumbent was created a bishop; the king presented (as he might). They were of opinion, That the grantee should [not] have the next avoidance, for it is the act of law, namely, the king's prerogative, which excludes him. [Cro. Jac. 691.] 14. H. 7. 27. Perk. 331, 332. Dy. 26. a.

Maleverer against Spinke.

In waste on a lease of an house with six acres of land, and six acres of wood for cutting down and selling trees growing

(32) **MALEVERER** brought waste against *Spinke*; and declared, that on a certain day and year he let to the defendant an house, and six acres of land, and six acres of wood;

wood; and that the defendant committed waste, viz. by cutting down and selling forty alhes, each of the value of twelve-pence, and seven oaks of the value, &c. growing sparsum upon the said acres of wood. The defendant pleaded as to thirty-six alhes nul waste fait; and as to the seven oaks he said, "that the said house at the said time when, &c. was in decay, s. the timber feeble, and rotten, wherefore he the said defendant (perceiving that the house without new repairs of timber could not stand) cut down the oaks, and made use of them in repairing the said house, &c. as he lawfully might:" and as to the four alhes, protesting that they were not of so much value, and were also beneath the growth of twenty years, for plea said, "That they grew upon one acre of land of the afore said tenements, which acre has been used from time immemorial to be arable, and for the melioration of the land for ploughing and sowing, and for the maintenance of husbandry he cut down prout, &c." Upon which the plaintiff demurred in law.—(33) MOUNTAGUE. The plea is bad for several causes. FIRST, The plaintiff supposes the waste to be in cutting, and selling; and the defendant answers only to the cutting, and not to the selling, which is traversable. So in trespass of trees cut, and carried away, &c. it is requisite to answer to both. And suppose he cuts them, and sells them, and buys them back again, and then uses them in repairing the house, yet the tort which is supposed in the selling is not answered. (34) So if a man sells the distress which he takes, and impounds, and buys back again, and impounds them, still the selling is not excused. And so thought KNIGHTLEY; for the book is so, in Long Quinto, E. 4. [100. b.]—In the next place he ought to conclude, "which is the same waste, &c."—Also those words "at the same time when, &c." should be referred to the time of the lease, as he thought, for no certain time is laid for the

sparsum upon the said acres of wood. Plea as to part, "that the said house at the said time when, &c. was in decay, and that defendant cut them down to repair the said house;" and as to the rest, "that they grew upon one acre of arable land, and for the melioration of it he cut them down." And demurrer, Because 1st, Defendant doth not answer to the selling. 2d, He doth not conclude, which is the same waste, &c. 3d, The said time when, &c. refers to the time of the demise. 4th, To change wood into arable land is waste: and 5th, The justification is of one acre only.

Dy. 90. a. 12. H. 8. 9. 21. H. 6. 42. b. 48. a.

4. E. 6. Waste, 136. y. Hales. Co. Litt. 53. b. Br. Waste, 37. 4. Co. 62. Cro. 95.

[Cro. Eliz. 268. 1. Ld. Raym. 231. 3. Term Rep. 296, 297. 1. Hen. Bl. 555.]

[* 36. a.]

2. E. 4. 55. a. 28. H. 6. 5. b.

1. H. 7. 7. 27. H. 8. 1.

(33) T. 4. Jac. in C. B. holden by COKE, Chief Justice, and the Court, That waste cannot be assigned in cutting down and selling white-thorn, unless it be specially counted that they are within the view, and for the safeguard of the house, or in a field of pasture for shade, and nurture of the beasts; but eradicating or unseasonably cutting them is waste. And so of under-wood, which is not waste in itself; nor is cutting down and selling beech of the size of timber, waste. So of apple-trees in an orchard, but not elsewhere. Dy. 90. pl. 8.

(34) Co. upon Litt. 53. says, That he may cut down to repair, and make it as he found it, but not to make it new, if there be weirs, flood-gates, or such like; but there, fol. 54. b. holds, that if the house be ruinous at the time of the lease, or in any case where the lessee was not compellable to repair, still he may cut down to repair it.

cutting down; wherefore, &c. And as to the oaks, the matter in law is, if a man make a lease of an house and other tenements, and at the time of the demise the house is ruinous and in decay, Whether the termor have authority in law to cut great trees for principal timber, or not? (34) And he and KNIGHTLEY thought that this is plainly waste, for in other state than the land was at the time of the lease, the termor is not bound by law to make repairs, for he well knew in what state the land was let to him, and could chuse whether he would take it, or not; and if he had suffered the house so in decay at the time of the lease to fall, he should not be punished for that waste; for it is a good plea to say, that at the time of the demise the tenements were in decay, &c. (35) And because no law obliged him to make repairs, as if the house were burnt by enemies or by tempest, if the termor rebuild it with timber growing upon the land leased, it shall be adjudged waste, because he did it of his own head; for the power of the termor to make repairs is only in small repairs, as to make splents, mud-walls, hedges and ditches, but not in large and principal repairs, as the principal timber, and stone-walls, and tiles, but a covering with thatching he may make. (36) And also it cannot be denied but that the property of the large trees, s. the timber, is reserved by law to the lessor; but he cannot grant it over without the licence of the termor, for the termor has interest in it, s. to take the mast, and fruit growing upon it, and also to have shade for his beasts, and the shreddings of it for fuel, but the real property in the body of the tree is in the lessor, as annexed to his inheritance: for this reason then the lessee has nought to meddle with the cutting of it, for it is no part of his duty; yet there are Books to the contrary, inasmuch as the trees are employed upon the inheritance of the lessor, whereby his inheritance is amended, and not impaired. (37) Yet it seems reasonable law that the termor ought to require the lessor to do the repairs, and not of his own head cut down such trees as he pleases, than which, perhaps, the lessor would rather give him one hundred pounds, by reason of some convenience which he has in such trees; as in trees growing within the scite of the manor in defence

12. H. 8. 1. b. cont.

20. E. 3. Fit. Waste, 32.
N.B. 59.

[2. Inst. 303.]

10. H. 7. 2. b. 3. b.
26. E. 3. 76. b. 29.
E. 3. 43. b. 49. E. 3.
1. a.

[Co. Lit. 53, 54.]

Poph. 47. 7/21. H. 6.
38. a. 46. a. 14. H. 4.
12. 26. 42. 49. E. 3.
76. b. 22. a. 1. a. 33.
H. 6. 1. 21. H. 6. 2.
46. E. 3. 22. b. Fit.
Waste, 30. 123. 11.
H. 4. 32. Cro. 38.

14. H. 8. 1. g. 4. Co.
62. b. 7. 21. H. 6.
38. 46. 1. Mar. 92. a.
90. pl. 8. Dier, 19.
pl. 116.
11. Co. 48. b. 81. b.
40. Aff. 22. 1. Rol.
Rep. 181.

22. H. 6. 18. 12. H. 8.
1. per Court. 35. H. 6.
24. 44. E. 3. 44. b.
Dier, 184. 44. E. 3.
21. a. 11. Co. 82. a.

[1. Br. Chan. Caf. 166.
2. Br. Chan. Caf. 88.]

(35) T. 29. Eliz. B. R. Rot. 828. *Glover v. Pipe*. [Owen, 92.] One leased a house to B. which was ruinous at the time of the demise; B. covenants not to do or suffer any voluntary waste, &c. the house falls, and A. brings debt; and adjudged that it lies, for that is waste, although B. may excuse himself upon the special matter.

of it ; and to save them entire, he has perhaps provided other timber to do the repairs of the house with; for which cause it is reasonable that the lessee should require the • lessor to do the repairs, and if he refuse to do it, then to cut the trees of his own head, and not before request, and notice given. Or if the lessor, after notice and request made, be negligent, whereby the house falls, the lessee is not without remedy, for he shall have an action upon the case against the lessor for not repairing it, and shall recover as much in damages as the inconvenience he suffers from the want of his house shall amount to; but although he may have his action upon the case, it is no law that for the avoiding of circuitry of action it should be lawful for a man to rebut and estop one action by another action, nor estop one tort by another tort. (38) As if the lessor be bounden to one in an obligation of one hundred pounds, and the lessee cut down twenty oaks, and sell them, and pay the obligee for the lessor, notwithstanding this an action of waste lies against him for this cutting down, although the money of the selling was converted to the use and profit of the lessor. And although a thing appear for the profit of a man, and not to his damage, yet it is not lawful for a man to commit a tort. As if a man saw the beasts of his neighbour in another land *damage feassants*, it is not lawful for him to drive them off, and if he do the owner shall have trespass; and yet he did a good act, and saved the owner from damages for the depasturing of his beasts. (39) Also it is ruled in 21. H. 7. [27. b.] that a person brings trespass for corn carried away, the defendant pleads that the corn was severed from the nine parts, and was in danger of being destroyed by cattle, wherefore the defendant carried it to the plaintiff's own barn, and laid it there, and judgment, &c. And this was adjudged no plea, and yet he received no damage. So here, although the termor has repaired the house of the lessor with the trees, which sounds to his advantage; yet, inasmuch as he hath exceeded his duty, and taken upon him the authority of the lessor, without any request, it is a reason why he should be punished. As if the commoner make a trench in the soil, whereby the soil is made better, yet he shall be punishable, because he has transgressed, &c. (40) Yet we will well agree that in some cases a man may justify the commission of a tort, and that is in cases where it sounds for the public good ;

Fit. Wast. 122. N.B.
6. a. 40. E. 3. 15. b.
10. H. 7. 5. a. 12.
H. 8. 1, 2. 18. E. 3.
55. b.

N.B. 93. L. 29. E. 9.
43. b.

Dyer, 198. b.

[1. Str. 615.]

[1. Term Rep. 20. Yet
see Hen. Bl. 90. 3.
Term Rep. 551.]

15. H. 7. 17. b. 17.
H. 8. 15. b. 12. H. 8.
26. Cro. 88. 2. H. 7.
14. b. Crp. 46. b.

[1. Roll. Ab. 820. 28
Leon. 174. com.]

1. Roll. Ab. 406.

12. H. 8. 2. a. Dy.
 36. b. 21. H. 7. 27. b.
 8. E. 4. 27. a. 37. H. 8.
 60. b. 7. H. 7. 2. a.
 Fitz. Wast. 141. 9.
 E. 4. 35. 18. E. 4.
 4. a.
 13. H. 8. 15. b. 8.
 E. 4. 18. 19. Davis,
 32. b. Fitz. Wast. 2.
 Stat. Marl. c. 13. 12.
 Co. 12, 13. 5. Co. 91,
 92. a.
 23. E. 4, 9. a. 2. H. 6.
 11.
 18. E. 2. Fitz. Execu-
 tion, 252. cons. 37.
 H. 8. 37. b. 18. E. 4.
 4. a. Polton, 95. a.
 27. Aff. 35. 9. 13.
 E. 4. 9. a.

* [37 a.]

2. Bull. 253. 29. H. 6.
 11. 42. 3. E. 2. Fitz.
 Wast. 2. N. B. 56. b.
 Stat. Marl. c. 23. 5.
 Co. 92. b. 1. Cro. 538.
 Hob. 62. 2. Cro. 556.
 Perk. 202. 21. H. 6.
 46. b. 2. H. 7. 14. b.
 44. E. 3. 44. 10. H. 7.
 3. 4. 2. E. 4. 26. 5.
 H. 4. 2. b.
 Dy. 90. b. 34. H. 6.
 21. a. F. Wast. 91.
 7. H. 6. 26. a. 37.
 H. 6. 18. a. Perk. 70.
 Dy. 230. a. 18. H. 7.
 1. a. 2. H. 7. 6. a.
 9. Co. 17. b. 18. a. 7.
 E. 3. Dower, 101.
 [2. Bac. Ab. 143.]
 Plow. 85. a. 4. H. 7.
 10. a. 9. E. 4. 74. a.
 2. Roll. 815. Hob. 234.
 Inst. 53. b.
 Fitz. 99. N. 20. H. 6.
 1. F. Wast. 43. 42.
 E. 3. 6. b. 2. H. 6.
 10. b. 10. H. 7. 2. b.
 It seems otherwise Co.
 Int. 53. b. L. 5. E. 4.
 102. a. 9. H. 6. 42. b.
 20. E. 3. 10. b. F.
 Wast. 131. 46. E. 3.
 17. a.

[5. Bac. Ab. 458.]

good; as in time of war a man may justify making fortifications on another's land without licence; also a man may justify pulling down an house on fire for the safety of the neighbouring houses; for these are cases of the common weal. So also is it, if the sheriff pursue a felon to an house, and in order to take him break open the doors of the house, this is justifiable, because it is for the public good that such felons should be taken. (41) But it is otherwise in particular cases; as if the sheriff break open an house to arrest one within the house by virtue of a *capias* in debt or trespass, he shall be punished, for this was a particular case, and is not for the public good. Also the lessee has villeins, &c. and one or more of them commits felony, the lessee pursues them as felons, * whereby he drives them off the manor, he is not punishable for waste; but if the villeins slander him, and therefore he drives them off, he is punishable. And so note this difference by KNIGHTLEY. (42) Also note another difference taken by him, where the defendant rebuts the plaintiff of an action by matter of another action against the plaintiff himself, *s.* in such cases where the defendant alleges a personal tort against the plaintiff, which the plaintiff himself hath done; as in waste it is a good plea to say that the plaintiff himself did the waste, judgment *si actio*. So in debt upon a lease for years, it is a good plea to say that the plaintiff ejected him out of the term, before which no rent was in arrear, &c. So in dower it is a good plea to say that the plaintiff detains certain charters concerning the land, &c. for in such case it is necessary to have the evidences to defend the land with; and besides the detainer of the plaintiff is a personal tort, &c. *Quære issud in 27. H. 6. [10. pl. 6.]* (43) Then as to the second plea, it seems that it is bad, for the termor cannot do a tort to the inheritance for his own convenience and advantage; for he cannot convert land into wood, or wood into arable land, or convert meadow into arable land, and if he do it is waste: but perhaps he may root up bushes, furze, and thorns growing upon the land, for melioration, for that is good husbandry, and the common

(41) By the common law no house may be broken open by the officer of the king at the suit of a common person (otherwise at suit of the king); but now by statute 21. Jac. [1. c. 19.] concerning bankrupts, the commissioners may break open the house of another for the debt of the debtor. And if bankrupts convey their goods to their neighbour's house, the commissioners cannot, but the sheriff may break open the house, because he is the officer of the king. The commissioners may break open the booth or ship of another to come at the bankrupt's goods. By Mr. *Burcdale*, reader of *Lincoln's Inn*, in *Law* 112.

law gives such things to the termor for fuel ; wherefore, &c.

(44) And also another reason is, that such change may be prejudicial to the lessor ; for it may happen that he be impleaded for this land, and his evidences may serve him for the proof of a wood, but not of land ; in which case, by an averment, he may plead that it is the same land, &c. but that averment may be forgotten in course of time, &c. wherefore, &c. And they took a further exception to the plea for another strong reason, For the plaintiff supposes the waste in six acres of wood, and the defendant justifies the waste in one acre of land, and so he answers nothing to the plaintiff : wherefore for all these causes the plaintiff shall recover.

3. Cro. 65. 7. H. 6. 5.
4. Co. 62. Moor, 370.
Yelv. 5. 63.

See 44. E. 3. 34. 7.
H. 6. 40. In waste,
that the termor may cut
trees for repairs. 8. So
is 21. H. 6. 46. In
waste committed. That
the house was ruinous
at the time of the de-
mise, and Long Quinte. 4.
100. b. and Wast. F.
N. B. 59. K. 10. H. 7.
3-

*Michaelmas Term.

* [37. b.]

29. Hen. 8.

(45) NOTE, That in Hil. Term 6. H. 8. Rot. 358.

it was alleged in arrest of the verdict at *nisi prius*, that the jurors eat and drank : and it was found, upon examination, that they were agreed before ; and when they came back to give their verdict, they saw REDE, *Chief Justice*, going on the way to see an affray, and they followed him, and in going, they saw a cup and drank out of it ; and for this, they were fined each forty pence ; and the plaintiff had judgment upon the verdict ; and error brought upon it.

Co. Litt. 227. b. Plow. 212. a. 38. E. 3. 24. a. 39. Aff. 19. Co. Litt. 157. b. 2. Roll. Abr. 713.
1. Cro. 22. 1. Ander. 183. [Bull. Ni. Pr. 308. 2. Hawk. Pl. C. 221. 12. Mod. 111. 2. Salk. 645.]

Jurors fined for drink-
ing between the time of
their agreeing in the
verdict, and giving it
into court, but the ver-
dict not vitiated.

14. 20. H. 7. 1. 3.
15. H. 7. 1. 11. H. 4.
17. 18. 62, 63. 14. H.
7. 30. 31. 35. H. 6.
Examination, 17. B.
N. C. 477. Dr. and
Stu. 157, 158. Dyer,
78. a. 20. H. 6. 24. a.
b. 2. Roll. Abr. 713.

(45) M. 2. El. By all the Judges, that a man, after verdict given, cannot move in arrest of judgment, that the jurors have eaten between their departure from the bar and the time of giving their verdict in court. [Mo. 33.]

Marshall et Al' v. Eure et Al'.

(46) AT *nisi prius* in the county of Warwick, between Richard Marshall and others and Ralph Eure and others, in *quare impedit*, the parties appeared by their

Consanguinity of the
sheriff to the defendants
given as cause of chal-
lenge, and afterwards
attornies,

stated to be *to his wife*, is an immaterial variance.

In challenging for consanguinity, there must be an averment that the sheriff was of kin *at the time of arraying the panel*.

Co. Litt. 157. 2. Roll.
Abr. 637. 42. 48. 2.
Inf. 15.

Plow. 426. Dy. 319.
b. 91. b.

9. E. 4. 6. a. 3. H. 6.
15. 19. H. 8. 7. a.
7. E. 4. 4. b. 15. H.
7. 9. a. 9. H. 7. 22. b.

[Ow. 44.]

[* 38. a.]

Bendl. 96.

attornies, and the jury also; and upon this, the said *Richard* and others challenge the array of the panel within specified, because they say, "that the said panel was arrayed by *George Darcy, Knt.* late sheriff, &c. which said *George* is cousin "to the said *Ralph*, one of the defendants; namely, the son "of *Thomas*, the son of *Johan*, the daughter of *Elizabeth*, "sister of *Anne*, mother of *Muriel*, wife of the said *Ralph*; "wherefore they pray judgment, and that the said panel may "be quashed and vacated." And the said defendants say, "that the said challenge of the said plaintiffs for quashing "the said panel in manner and form aforesaid pleaded, is not "sufficient in law to quash the said panel, &c. and they "pray judgment, and that the said panel may be adjudged "good and lawful, &c." (47) And because the inducement to the challenge was, that the sheriff was *cousin to the defendant himself*; and in the shewing how the consanguinity was, it concludes, that the sheriff was *cousin to the wife of the defendant*; so there is a variance between the challenge and the conveyance; this was the question in the case: and the justices were in doubt about it, but yet their opinion was, that the array was quashable, notwithstanding the variance; for the effect of the challenge is to have the array quashed, by reason of the favor and partiality of the sheriff; and to say that the sheriff was cousin to the wife of the defendant, was a principal challenge, as well as if the consanguinity had been to the defendant himself, and so in both cases the challenge is principal, and that is the effect of the challenge: and although there is a variance between the premises and the conclusion, yet that is only conveyance, and so not material; * wherefore, &c. (48) And yet MOUNTAGUE, who was of counsel for the defendant, would have the array quashed, to be secure from all error. And then JAMES DYER examined well the challenge *ut supra*, and shewed to the defendant's counsel that the challenge was not well taken, because the challenge might be true, *viz.* that the sheriff was cousin to the wife of the defendant at the time of the challenge taken, and yet, at the time of the panel made, she might not be wife to the defendant: but consanguinity alleged to the defendant himself, at the time of the challenge made, is good; for it cannot otherwise be understood, but that the consanguinity hath always continued before between them, for a man cannot be cousin of the blood to me to-day, unless he was always so before.

before. (49) And this matter was moved to the Court; and none of the Judges had perceived this before in the challenge; and they unanimously thought that this matter made the challenge most clearly bad, for it should be, that "*at the time of the arraying of the said panel, the sheriff was cousin to the wife of the defendant;*" whereas it may be well understood, that the defendant had married his wife afterwards, and then the panel was indifferently made. And for this cause the array was affirmed good; and so the other matter in law was waived for this: *ideo quare inde.*

10. H. 7. 7. 2. Dy.
91. b. 6. E. 4. 5. b.

[21. Vin. Ab. 236. 237.
3. Bac. Ab. 252.]

Gawen v. Huffee and Gibbes.

Hil. 26. Rot. 40.

(50) **G**AWE N brought appeal of robbery against *William Huffee and Gibbes* as accessories, and the appeal was brought in the county of *Wiltshire*, where the robbery was committed. And he declared, that on the second day of *March*, in the twenty-fifth year of the now king, one *Anthony Sawgbel* and others, who are attainted, entered into his house in the county of *Wiltshire*, and thence feloniously stole certain rings and jewels, and shewed the value and every thing in certain; and that the said *Huffee* and *Gibbes*, on the twenty-seventh day of *December* then last past, the said *Anthony*, &c. at *London*, in the parish of *St. Dunstan*, &c. to the felony aforesaid, in form aforesaid committed, feloniously did incite, procure, and abet, &c. (51) And to this count the defendants demurred in law: and, Whether the appeal should be brought against the accessories in *London*, where the procurement was, or in the county of *Wiltshire*, where the robbery was committed? was the question. **KNIGHTLEY** thought the appeal did not lie. And first, It is a maxim, that an action shall always be brought in the county where the best trial and notice of the fact may be had, and especially where the tort is personal; for there is a difference, when the action is in the right, and when in the possession: (52) for if a man have lands in one county which he ought to inclose against land in another county, the *curia claudenda* shall be brought where the land is against which the inclosure ought to be made, because that

An appeal of robbery against accessories abetting in one county a felony committed in another, must be laid in the county where they did abet the crime.

7. Co. 2. b.
2. Keble, 527.

Stat. 2. E. 6. c. 24.

7. Co. 2.

43. E. 3. 17. b.

11. Ric. 2. Fitz. Action sur le Cafe, 36.
[Bro. Curia Claudenda 5. and Lord Hale's Com. on F. N. B. 297. note (a) cont.]

N. B. 128. a

19. H. 6. 50. b. 7. H.
4. 8. a. 4. E. 3. 7.

Litt. §. 501. 43. E. 3.
49. 48. E. 3. 26. 11.
H. 4. 6. b. 49. 24.
E. 4. 26. 25. b. 21.
H. 7. 4. a. 4. H. 4.
1. b. 21. H. 6. 3.
10. E. 4. 10. 49. E. 3.
5. 34. H. 6. 17. 14.
E. 4. 3. b. 3. H. 4.
4. a. 1. a. 4. E. 4. 2.
38. H. 6. 14. 15. 16.
H. 6. Action sur le case
44. 9. H. 4. 3. 20.
H. 6. 10. 3. H. 7.
12. a.

[5. Bac. Ab. 324. Str.
727. 2. Term Rep.
241. 275.]

7. Co. 2. b.

10. E. 3. 7. b.

is in the right; but if he be * tenant for term of years who has the land against which, &c. he cannot have the *curia clau-
denda*, and therefore he shall have an action upon the case in the county where the land which ought to make the inclosure lies, because it is in the personalty. And so in actions real, if an issue arise upon the land, it shall be tried where the land is; or if a man have cause of action of a thing which arises from land, perhaps because it favours of the nature of the land, the action shall be brought where the land is, which is the principal; but this appeal is neither real nor personal action. Yet I allow that sometimes an action may be brought either in one county or in another. (53) As a writ of annuity may be brought in the county where the parsonage is, or the seisin is alleged. And 41. E. 3. [1. b.] the case is, A man retains a servant in one county, and the servant departs in another county; the action shall be brought in either the one or the other, at the election of the plaintiff: so is it if a physician undertake in *Middlesex* to cure me of all maladies for a certain sum of money, and administer unwholesome medicines to me in the county of *Essex*, by which my illness is increased; it is at my pleasure to sue him in the one county or the other, inasmuch as the defendant hath a plea given him in each county, s. in the first case the retainer is traversable, and so also is the departure. (54) And in the second case, if the action be brought where the undertaking is, *non assumpsit* is a good plea for the defendant, and of that the county may have good knowledge; and if he bring it where the medicines were administered, that is traversable generally. So is it if a man forge a deed in one county which is proclaimed in another, the action is maintainable in the one or the other, because the forgery is traversable, and so also the proclamation. So this distinction was taken, s. Where the defendant shall not be barred of his advantage of pleading the general issue, which may be well tried in the same county, the action may be brought in the one county or the other; but where that plea is not given to the defendant, it is otherwise. (55) As if a man undertake to purchase for me a manor in another county, and do it not, an action upon the case shall not be brought where the manor is, but where the undertaking is, for that only is traversable. So here, if the action could be maintainable by the law in *Wiltshire* against the accessories for this abetting in *London*,
the

the defendants would be tolled of their plea, s. not guilty to the procurement: for that is a good plea here, as it seems to me, inasmuch as the principal felony is not laid to their charge, but the procurement only, which is a personal tort committed here in *London*, whereof those in *Wiltshire* have no knowledge by the law. * (56) And it would be unreasonable to oust them of their plea which the law has given them. And it is not like an appeal of felony; that is to say, if a man feloniously take chattels in one county, and carry them into another county, the appeal may be brought in either county, for the felony follows the goods, and runs with them; but if a man rob me in one county, and carry the goods into another, the appeal shall be brought only where the robbery was committed, and so there is a difference. Also if a man procure or command one to do a trespass in another county, the action shall be brought against the commander or procurer where the tort was committed, because there all are principals, but it is otherwise here; wherefore, &c. (57) *HALES*, à *contra*, for the abetting and the felony committed are all one act, for the abetting would not have been wrong without an act ensuing, wherefore the act ensuing makes the other a wrong in both the counties at the pleasure of the plaintiff; and when a man has an action founded upon two torts in several counties, the action may be brought in either the one or the other, as in the case of forgery in one county, and uttering in another; so many other cases may be put upon the same ground. (58) And it is not like the case in 43. E. 3. [17. b.] For there a murder was committed in one county, and the stranger received the murderer *post feloniam factam* in another county, for there was no knowledge, &c. for the receiver was not privy to the first act, viz. the murder, but the felony in him commenced there where he received; but in the case here it was otherwise; wherefore, &c. And note well the difference between these cases. And also for another reason, here is a tort committed which it is improper to let pass unpunished. (59) And if I can prove that the plaintiff would be without remedy if the appeal should be brought in *London*, it will be a reason for supporting the

[4. Bl. Com. 305. i.
H. H. P. C. 507, 508.]

4. H. 7. 5. b. 7. H. 4.
43. 44.

[2. Hawk. P. C. 247.
2. Hale's Pl. C. 163,
164.]

7. Co. 2. a. infra 40. 2.
18. E. 3. 32. a. 11.
H. 4. 93. b. B. N. C.
236. .
Stamf. 182.

11. Co. 5. b. Dy. 40. a.

7. Co. 2. a.

45. Aff. 9. 44. Aff. 16.

18. E. 3. 32.

(56) If thieves take a man in the hundred of *B.* and carry him into the hundred of *C.* and there rob and spoil him of his property; the hundred of *C.* only is charged upon the statute of *Rates*, by *MEAD*, *WINDHAM*, and *DYER*, for it is not a robbery before the taking of the property. *M. 23. Eliz.*

action

4. Co. 47. b.
9. H. 4. 3. a.

action in *Wiltshire*, as it is brought: and this may be proved so. I understand the law always to be, that a man shall have but one appeal against principal and accessories, and not several appeals; and then if the law compel me to join all in one appeal, it would be right to bring the action in *Wiltshire*, for of necessity it must be brought against the principal himself in *Wiltshire*, where the principal felony was committed. (60) For if it be brought against all in *London*, how can they have knowledge of an act in *Wiltshire*? *quasi diceret non*. Wherefore when a man has no remedy to punish a tort, the law favours him in the trial: as if my father make a journey to the Holy Land, and die in the way beyond sea, I shall have an assize of *mort d'ancestor*, and his death shall be tried within the realm, and the law will compel them to take notice of the death, &c. (61) Also this is a case adjudged: * If a man retain another in *England* to

6. Co. 47. b.

22. Aff. 25.
N. B. 196. a.

* [39. b.]

48. E. 3. 2. b. 11. H.
7. 27. a. 2. R. 3. 4. a.
7. H. 7. 9. a. Fit. 120.
5. 27. E. 3. 84.
F. Det. 143.

4. Co. 47. b. 9. H. 4.
1. Stamf. 65. 69.
Cro. 83.

Pl. 191. a. ante, 15. a.
5. H. 7. 24. Flo. 149.
2. R. 3. 13. a. Dier,
139. 3. H. 4. 5. a.
13. H. 7. 14. b. 8. Co.
120.

serve him in war in *France*, the action for the salary shall be brought here; and though the servant did his service there, the agreement may be tried here, because otherwise they would be without remedy; wherefore it is the same in this case. (*Sed quære*, Whether a man may not have several appeals? that is to say, one against the principal, and another against the accessory, for I see no reason why the plaintiff shall be driven to join them all in the appeal.) (62) And he said further, To argue upon the notice and trial is out of the question here, for the matter has not gone so far that he shall be tried, for he demurs in law, and so has waived that matter, and in a manner confessed it by his demurrer. For in 18. E. 4. [16, 17. a.] a man brought an action of debt on bond, and did not count at what place the bond was made, wherefore the declaration was bad; and there the defendant pleaded an acquittance, by which plea he acknowledged the deed; and it was ruled, that he had made the declaration good; and so here; wherefore, &c. (63) BROWN, *à contra*: For he has falsified his own declaration by his own

(60) Profession of a Knight of Rhodes, which is pleaded, shall be tried by the country here; so of a cardinalship of Rome, 31. E. 1. Fitz. Trial, 99. 54. 5. E. 3. 9. Hil. 10. E. 3. 1. a. p. 3.

(61) *T. 29. El. C. B. Hales* brings debt on bond against *Bell*. [Owen, 6.] The bond was conditioned, that if the said *Bell* pay to the said *Hales* forty pounds within forty days next after the return of one *Russell* to *England* from the city of *Venice*, &c. the defendant pleaded in bar, that the said *Russell* was not at *Venice*; and adjudged by the justices no plea; for in such cases, where parcel is to be done within the realm, and parcel out of it, the plea should be triable within the realm.

proper shewing; but perhaps if he had counted that the abetting was in the county of *Wiltshire*, where the action is brought, although in fact it was in *London*, yet the jury might find him guilty (*Quære inde tamen*). But because there are three things in law which are much favoured, namely, life, liberty, and dower, it is right that the trial should be most favourable for the defendant in this appeal, and that will be where the abetting was committed, for the life of the defendant is put in jeopardy; wherefore reason wills that he should have favour, that is to say, he shall be tried where the fact was committed. Wherefore, &c.

(64) So is it if a villein bring an action against his lord, and he claim him as villein regardant to his manor in another county, that shall be tried where the action is brought in favour of liberty, and not where the manor is (but that is by the statute, &c.). And as for what is said, that the action cannot be brought in any other manor than it is, the law is not so, as I understand it: for suppose the appeal had been brought in *London*, here, where the abetting was, and the defendant had pleaded not guilty, those of *London* may, by the law, have notice of the attainder of the principals in *Wiltshire*, for that is matter of record, and every man is bound to take notice of matters of record; wherefore that objection is answered, &c. (65) And as for saying that the felony is confessed by the defendant, that is not so, for clearly he shall be received after the demurrer adjudged, to plead not guilty, because he demurs for insufficiency of the declaration. And in the case put in debt, if the defendant had demurred to the declaration, clearly * the demurrer should have been adjudged for him: wherefore it appears, that by his own shewing he hath abated his appeal, &c.

(66) LUKE and PORTMAN, *Justices*, to the same purpose (*absentibus* FITZJAMES and SPILMAN), For it is common doctrine that the action shall be brought in the county where the tort commences, for there the people have better notice *de rei veritate*, by the intendment of law. But if a man feloniously steal chattels in one county, and carry them into another county, the party may elect to have his appeal of felony either in the one county or the other; and the

22. 39. H. 6. 52. 49.
40. 47. E. 3. 36. 27. a.
11. Eliz. 284. a. 43.
44. E. 3. 31. b. 9. H.
5. 1. 44. Aff. 4. 35.
H. 6. 12. Lit. 193.
9. Ric. 2. c. 2. 13.
H. 7. 17. a.

[See 4. Bac. Ab. 132.]
14. E. 4. 7.

* [40. a.]

[2. Hawk. 247. 4.
Black. Com. 305. 1.
Hale's Pl. C. 507, 508.
2. Hal. P. C. 163, 164.]

(64) Ro. Parl. 45. Num. 37. Petition of the commons, that villeinage alleged in the plaintiff, as regardant to the manor, &c. might be tried where the manor was; and the answer was, *Le Roy s'advijera*.

4. H. 7. 5. 7. Co. 2. a.
 Ante, 35. a.
 Perk. §. 93.
 B. N. C. 236.
 19. H. 6. 66. a.

[Cowp. 176.]

Dyer, 154. b.

Dr. and St. 39. a.

35. 44. 5. Alf. 16. 9.

Dr. and St. 100. b.

[Dougl. 791.]

15. E. 4. 19. a. 40.
 E. 3. 7. a.

[a. Term Rep. 241.]

33. H. 6. 3. b. 38. E.
 3. 22. Fitz. Covenant,
 9. 14. E. 4. 3. a. 20.
 H. 6. 10. 7. Co. 2.

* [40. b.]
 [2. Str. 776.]
 3. H. 4. 4. 8. 38. H.
 6. 23. 15. b. 5. E. 4.
 21. Fit. Affize, 388.
 Dier, 213. a.
 [1. Lev. 114.]
 1. Cro. 184. 143. Sid.
 240.

reason (*per* LUKE) is, because the property of the goods is not yet devested out of the possessor: but it is otherwise if a man take goods in one county as a trespasser, and carry them into another county, the action shall be brought in the first county, because the property was in the trespasser, and devested out of the other, and therefore the action of trespass shall be brought where the trespass was committed. (67) And there is a difference where an act grows and tends to a felony, and where only to a trespass, as to the nature of the action; for in the first case, if an abetting or procuring be in one place, and the act be done in another county, then the accessory is guilty, but that is where his procuring was; but in the other case, he is no accessory, but all are principals in trespass: and therefore although the command was in one county, and the trespass in another, yet all are principals where the act was done. (68) And they put the case in 43. E. 3. [17. b. 18. a.] And a distinction was there taken where there is a distance between the counties, and where there is not; for if a vill extend into two counties, and a felony be committed in one county of the vill, and a receipt in the other part, the action shall be brought where the act was done, at the election of the party, for the law intends that they of the vill may take notice of all manner of acts done within the said vill; but if the counties had been distant, the law intends the contrary. (69) And to prove that the action shall be brought where the wrong was done, it is ruled in [38] H. 6. [14. b.] where the plaintiff recovered in *quare impedit* of a church in *Devonshire*, and delivered the writ to the bishop in *Middlesex*, and he refused the clerk, that because the *quare non admittit* was brought in *Devonshire*, it should abate, and ought to be brought where the refusal was, for there commences the plaintiff's grievance: but sometimes it is in the plaintiff's election to bring the action in which county he pleases. (70) As if a man lease land in *Middlesex*, which land lay in *Essex*, rendering rent, an action of debt lies either in the one county or the other, because there, there is a continual privity between the lessor and lessee; and so is it in case of a retainer in one county and a departure in another, the action lies in the one or the other, because the privity continues; * but where the privity is determined, it is otherwise; as if, in the first case, the lessee do waste, now that is a tort and forfeiture of his estate, and

to a determination of the privity; wherefore the action shall be brought in *Effex* only: so it is in the other case, if a stranger take my servant in another county, the action shall be brought there, and not where the retainer was. (71) There is also a case in our Books [7. H. 7. 8. b.], that a man was stricken in one county, and died in another; this matter shall be tried by both counties: but the case cannot be so here, for those of *London* cannot join in trial with those of a foreign county. And although it is a damage to the plaintiff that his appeal is abated, yet that injury shall be sooner suffered than an inconvenience; in like manner as where one is murdered, and leaves no wife or issue, the appeal fails, therefore it would be an inconvenience to try a thing done in *London* by those of *Wiltshire*, whom the law does not intend to have any notice of it; wherefore it seems the appeal does not lie (a).

Stat. a. & 3. E. 6. c. 24. remedies this. 31. H. 8. 46. a. Stamf. 42. [9. H. 6. 63. b. Infra. 46. a.] Dy. 50. b. 38. 43. 46. E. 3. 29. 17. b. 18. a. 7. a. 10. 4. H. 7. 20. a. 3. & 18. a. 3. H. 7. 12. a. 6. H. 10. a. 45. Aff. 9. [2. Rol. Ab. 603. pl. 10.] [Privil. Lond. 79. but see a. Wilk. 136.]

37. H. 6. 3. a. 11. E. 4. 5. a. 7. Co. a. Stamf. 57. 63. 59. a.

(a) Now by 2. & 3. Ed. 6. c. 24. §. 2. it is enacted, that where a person is stricken or poisoned in one county, and dies of the same in another, the indictment shall be in the county where the death happens; and by §. 3. appeal of such murder may be commenced as well against principals as every accessory in the said county where the party so dies, in whatsoever county the accessories may

have been guilty of the same. And by §. 4. where a murder or felony is committed in one county, and there are accessories in another, the indictment shall be in the county where such offence of the said accessories was committed: and the mode of proceeding is there pointed out. See 4. Black. Com. 303, 304, 305, and 2. Hawk. Pl. Cor. 314, 315. See also 2. Geo. 2. ch. 21.

Hilary Term,

29. Hen. 8.

Chafyn de Meere's Case.

(1) **T**HE case of *Chafyn de Meere* was as follows: The Dean of *Salisbury* made a lease to him of the parsonage of *Meere*, and the words were, "that the Dean, with lease by a dean with the assent of his chapter and the seal of the chapter affixed, is good, if the

(1) *Banister's Case*, [Cro. Car. 38.] it was adjudged, that if a parson make a lease for years, and the patron and ordinary put their hands and seals to it, it is a good lease to bind the successor. 7. H. 4. 15. Patron and ordinary give leave to the parson to grant an annuity, the parson does grant it, and dies, the successor shall not avoid it. See § 14. H. 6. 16. A dean, seised in right of himself and his chapter, makes a lease for years; the chapter by itself confirms the said lease, nevertheless it is void, because their deeds, being severed, have no force, for they are an entire body; *secus*, if after the lease they both confirm it, because this amounts to a new lease.

dean alone be parson in right of his deanery; *ficus* if the dean and chapter together be parsons *imparsonés*.

B. N. C. 201. Perk. fol. 156. 1. Rol. Ab. 478. 2. Leon. 176. 4. Leon. 11. 44. Litt. 65a. 1. E. 5. 5. a. Fit. Ab. 11. Flo. 199. 2. 24. H. 6. 17. a. 2. Mar. 106. b. 11. H. 7. 6. Dy. 97. a. 178. a. 273. b. Co. Litt. 300. b. Br. Faits, 45. Confirmation, 30. 7. H. 4. 15. b. [5. Vin. Ab. 372. 3. Bac. Ab. 382, 383.]

the assent and consent of the whole chapter, demised;" and the seal of the chapter was affixed. And the opinion of the Court was clear, that if the dean and chapter together are parsons *imparsonés*, such lease is void, because all of them are persons capable by law of making a lease, or being impleaded; but it is otherwise, if the dean alone in right of his deanery were the parson, for then he alone is the lessor, and the chapter are only assentors: so is it of an abbot and convent, because the convent are dead persons in law, and cannot make a lease, but only assent to a lease made by their superior; but otherwise is it in the case of a dean and chapter, &c.

* [41. a.]

* Easter Term,

30. Hen. 8.

In dower a remitter to defeat the estate of the husband cannot be given in evidence under *ne unques seife que dower*, but must be specially pleaded.

[Booth. Real Act. 170.] 12. H. 8. 1. F. Condition, 8. Dy. 183. a. 276 a. 305. Co. Litt. 31. b. 21. E. 3. 35. b. 5. E. 3. 36. 46. E. 3. 24. b. 1. Leon. 66. 3. Leon. 80.

3. Cro. 506. Post. 365.

41. 44. E. 3. 30. 26. b. 46. E. 3. 5. b. 10. H. 6. 17. N. B. 86. 146. F. Perk. 302. 19. H. 6. 45. b. 1. H. 5. 11. b. 40. E. 3. 43. 18. H. 6. 33. F. Dower, 127. Issue, 36. 28. Aff. 4.

(1) **I**N a writ of dower, the issue was *ne unques seife que dower, &c.* and at the trial it was given in evidence by the demandant, that a feoffment was made to the husband in fee, and the deed shewn to the Court: to which it was answered by KNIGHTLEY, that long before the feoffment the husband was seised of land to him and to his first wife in special tail, and then made a discontinuance, and took back an estate in fee by the feoffment aforesaid, and died seised of such estate; wherefore the heir who is tenant in tail is remitted, and therefore the second wife not dowable thereof.

(2) And upon this matter, MOUNTAGUE would have demurred in law, and dismissed the jury; and the Judges were clearly of opinion that the jury must of necessity find for the demandant, for their charge is solely upon the seisin, *s.* Whether the husband had seisin of any dowable estate? and they can take no notice of the remitter: and yet if the special matter had been pleaded, the demandant would have been barred of her action; but now they can take no notice of it,

(2) So adjudged per Curiam in *C. B. Trin. 39. Eliz.* in the case of *Osmond et ux. v. Scobberd*, [Noy. 66.]

when

when the general issue is their charge. For if a man make a feoffment upon condition, the feoffee takes wife, and the feoffor enter for the condition broken, and the wife of the feoffee bring dower against the feoffor, who pleads *unquæ seisie*, it shall be found against him; wherefore, &c. (3) But KNIGHTLEY would have had the jurors find all this matter, and give their verdict at large, but the Judges would not permit it. *Quære inde*, because in the time of *Ed. 1.* there was a case where the husband made discontinuance of his wife's land, and died, and his wife recovered against the discontinuance, and he died; and his wife brought a writ of dower against the wife who had recovered, and she pleaded the general issue, *s. ne unquæ seisie que dower*, &c.: and all this matter was found by a special verdict; and judgment was given, that upon this issue, which was the only one joined, the demandant ought to recover her dower, which she could not have done, had the pleadings been good.

Trinity Term,

30. Hen. 8.

Arnold against Bingham.

(4) **I**N replevin brought by *Arnold* against *Bingham*, the plaintiff was nonsuited; wherefore the defendant had a writ *de retorn' habend'* awarded in *Michaelmas Term* 27. *H. 8.* returnable on the octave of *Saint Hilary*, and the writ was delivered of record to the under sheriff on the 29th day of *November*: and the entry of the record of the nonsuit * was, that afterwards, "to wit, on the 25th day of *November*, "in the same Term, comes the aforesaid plaintiff, and prays the "writ of our lord the king of second deliverance, and it is "granted him returnable on the morrow of *The Purification*;" and on the octave of *Saint Hilary*, the sheriff returned upon the *retorn' habend'*, that the plaintiff had eloigned the cattle; wherefore, &c; and on the morrow of *The Purification*,

A writ of second deliverance is a *superfideam* to a *retorn' habend'* sued out after, though returnable before it.

Dy. 59. b.

* [41. b.]

8. H. 6. 28. Bro. Second Deliverance, 10.
33. E. 3. F. Dower,
25. b.
Dy. 59. b.

Long Quinto, E. 4. 120.

[a. Wils. 116, 117.]
2. Infl. 341.
8. H. 5. 6.

[F. N. B. 170. note (e).
See Gilbert's Law of
Replevin, Edit. 1780.
P. 173. &c.]

the writ of second deliverance was returned, that "*I have caused to be delivered to the aforesaid plaintiff his cattle*;" and then the parties appeared and pleaded to issue; and it was found for the plaintiff in *Lent* last past. And it was alleged in arrest of judgment, that the second deliverance does not lie in this case, because it appears by the return of the sheriff, that the plaintiff himself has eloigned the cattle, which is a personal tort, wherefore the *withernam* lies against him; and, for this reason, the second deliverance does not lie, when it appears that the plaintiff himself is in possession of the cattle. Wherefore, &c. And the Judges doubted of this. (6) And KEILWAY, of the Inner Temple, said, that he had a report in 22. H. 7. [Keilway, 92. b.] that such a case was well argued, and it was ruled, that the second deliverance lies not; and for the same reason given above.— And yet at last it was agreed, that *Arnold* should recover his damages, for the second deliverance is for no purpose but to revive the first plaint, and is a *superfedeas* of the writ *de return' habend'*. And also it appears by the entry, that the *return' habend'* was awarded to the sheriff after the second deliverance prayed; in which case the sheriff had no power to serve the *return' habend'*, but only the second deliverance. (7) And although he returned this on the octave of *Saint Hilary*, that the beasts were eloigned, this was without warrant, and his hands were closed by the second deliverance; although it was returned afterwards, s. on the morrow of *The Purification*; and also all the prothonotaries (except *Rokewood*) said, that it is the common practice to award the second deliverance in such case, to avoid the mischief of a *withernam*; and so said *Peny*, and all the attornies.

(6) Second deliverance may be sued after a *withernam* awarded to the defendant of the first distress; where it is returned that the beasts are eloigned, the second deliverance shall be of the beasts taken by distress, and not of beasts taken by *withernam*. Dyer, 59. b.

A return to a writ of proclamation upon an exigent under 6. H. 8. c. 4. made by the sheriff out of office, is void.

(8) NOTE, That in *Trin.* 29. H. 8. Rot. 575. a writ of proclamation was awarded into the county of *York* upon an exigent which was returnable on the octave of

(8) East. 41. *El. & Sir Robert Sailbury's Case*. If one who is not sheriff return the writ, and then judgment be given, this is error; but if it be returned by two, and one of them is not sheriff (as was the case of the sheriff of *London*), that return may be amended and made good; and so it was adjudged 9. Jac.

M. 30. & 39. *Eliz.* B. R. *Palmer v. Porter and March*. [Cro. Eliz. 512. Moor. 431.] Action upon the case, that whereas plaintiff hath recovered in debt against I. &c. and had a

seize

of *Saint Martin*. And on that day the defendant was returned, according to the statute of the now king, made in the 6th year of his reign [c. 4.] by *Francis Frobisher, Knt.* sheriff of the county of *York*. And because it sufficiently appeared to the justices, that before the said octave of *Saint Martin*, the said *Francis* was entirely discharged from the office of sheriff of the said county, it seemed to the said justices, that that return was not sufficient in law; wherefore, by the said statute, the said outlawry in form aforesaid proclaimed and had against the said defendant, is wholly void, and of no strength or effect in law; therefore let no proceedings be had upon the said outlawry, &c.

Dy. 163. b. 162. 177.
350

36. H. 6. 26

[Imp. Off. of Sheriff,
131.]

Raft. Exigent, 5.

28. H. 8. 28.

[Vin. Ab. Return, (D.)

Bac. Ab. Sheriff, (I.)

See 20. Geo. 2. c. 37.

& 3. Term Rep. 1.]

fiat facias, &c. and that the sheriff made his warrant to the defendants, bailiffs of the vill, who have the return of writs, &c. who returned that the defendant had nothing, &c. when in truth he had goods to the value of the debt, and that by reason of their false return he was damaged, &c. and the jury found all in certain, but that before the day of the return, they were discharged of their office, and new bailiffs elected; and that after that, one of the defendants returned the writ in the name of both, and delivered it to the sheriff for a return to the Court, &c. And judgment against the plaintiff; for the return by them, though not true, is no return; but it was agreed by *2. J. Barn.* and the other Judges, that if the plaintiff had not so directly concluded "by reason of which false return," &c. he might well have maintained his *action*.

* Michaelmas Term,

[* 42. a.]

30. Hen. 8.

Executors of Grenelife against W——.

(9) **T**HE executors of one *Grenelife* brought debt on a bond made in *August*, and indorsed with this condition: "The condition, &c. That whereas the within-bounden *W.* hath sold to the within-named *I. G.* a certain meadow in *D.* the aforesaid *W.* shall warrant the said *I. G.* and save harmless against lord, and king, and all other, if that the said *I. G.* shall have and peaceably enjoy the said meadow, to him and to his heirs, to hold of the lord of *W. Hall*, by the service thereof, after the custom of the manor, that then, &c." (10) The defendant pleaded, that the said meadow was customary and parcel of the said

Debt on bond, with a condition reciting a sale of lands, and that the obligor shall warrant *A.* if he shall enjoy it peaceably to him and his heirs, to hold of a manor by services, &c. Defendant pleads a custom of the manor for the lord to enter for rent arrear; and that *A.* enjoyed peaceably till his death, when the plaintiff his son entered without admission, contrary to the custom; also stating an

entry of the lord for rent arrear. The words "*warrant the said A.*" (without saying *what*) shall be meant of the lands so sold.

If *A.* peaceably enjoy during his life, that is sufficient performance of the warranty.

The warranty only extends to titles *in esse* at the time of making it.

The plea is not double in stating both the entry of the heir without admission against custom, and of the lord for forfeiture.

But bad, for not stating specially that defendant did warrant, or that *A.* never was molested.

[*Infra*, 255. a. Co. Litt. 383.]

25. H. 8. 30. a.

Co. 77. a.

31 H. 6. 41. 12. E. 2.

Fitz. Voucher, 262. Cro.

108. 22. E. 4. 16. a.

31. H. 8. 45. b. 14.

H. 4. 13. a.

[Co. Litt. 383. b.]

8. E. 3. 67.

* [42. b.]

Plow. 171. a. 22. H. 6.

22. a. b. 38. E. 3. 9. 14.

manor of *W.* and demised, and demisable by copy, &c. and that there is a custom within the manor, that if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for the time being may enter for forfeiture: and he said, that the said *I. Grenelife* took the said meadow by copy to him and his heirs, at a court holden in *October* next after the making of the bond; and shewed the certainty, and who was steward: and he further said, that the said *I. G.* during all his life-time had and peaceably enjoyed the meadow, and died seised thereof, by reason whereof the said meadow descended to one *B.* as son and heir, which son *de injuriâ suâ propriâ* entered without the admission of the lord, against the custom of the said manor; and because three shillings of rent were in arrear on such a day the lord entered into the meadow, as into lands forfeited to him; wherefore he prayed judgment, &c. (11) And to this the plaintiff demurred. And it was argued by *BROWN* and *KNIGHTLEY* (but *I* was not present); and at this day the Justices argued. And *JENNEY* moved, that the condition was void, inasmuch as the defendant is not bound to warrant and save harmless, *if the obligee peaceably have and enjoy the land*; for if he peaceably enjoy the land, to what purpose should he warrant? (12) Also it was agreed by all, except *BALDWIN*, that these words "*shall warrant the said I. G.*" not shewing what thing, the law will put this construction upon, *v.* that *W.* ought to warrant the land of which the communication is made; and for this *SHELLEY* cited a case of 6. E. 2. [Fitz. Voucher, 258.] which was denied to be law by *BALDWIN*. The case was in dower, that a man made a feoffment to one and to his heirs, and by the same deed bound himself and his heirs to warrant *contra omnes gentes*, and did not shew certainly to whom he would warrant, nor how long the warranty should last, and yet the Book is * ruled that the feoffee to whom the statute was made has a fee-simple in the warranty as he has in the land; but if the intention of the warranty appear plainly by express words, it shall not extend beyond them. (13) As if a man make a feoffment in fee, and warranty to the

(12) If he say *in formâ prædictâ*, it is clear by the Books that the warranty extends to the whole estate, Perk. 242. Plow. *Morgan and Manxel's Case*, 5. a. and Plowden thought in his, 42. [39.] *Query*, that without those words the warranty runs with the estate; and this seems the better opinion, for the nature of a warranty is properly to run with the estate.

feoffee

feoffee only without mentioning his heirs, there the warranty shall enure for life only, because it is taken strictly; and yet if the feoffee recover in value, he shall recover a fee simple, because he loses a fee simple; and they all agreed that the obligor is not bound to warrant and save harmless the heir of *I. G.* because it does not reach to the heirs.

(14) And JENNEY made a good distinction in the other point of the condition, *s.* If *I. G.* shall peaceably have and enjoy to him and his heirs, for the obligor is not bound that the heirs of *I. G.* should peaceably enjoy by any words in that sentence; and if the father during his life enjoyed the land peaceably, then he enjoyed it peaceably to him and his heirs, for he had a fee simple; but if the words had been, that *if I. G. and his heirs* peaceably enjoy, &c. then he is bound by the words, that *the heirs* shall enjoy; and so there is great difference. (15) Also all the Judges agreed, that when a man binds himself and his heirs to warranty, they are not bound to warrant new titles of actions accruing through the feoffee, or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made; and because here the title to enter was given to the lord by the custom for the non-payment of the rent, this title is after the warranty made, wherefore the defendant is not bound, &c. And also here the heir, who is executor and plaintiff in this action, is the cause of the breach of the condition, whereof he shall not himself take advantage, so as to give himself an action by his own act. (16) It was also moved by the *Serjeants* at another day, that the plea was double, *s.* one, because it is alleged that the plaintiff as heir of *I. G.* entered into the land without admission, against the custom; and the other is, that for three shillings of rent the lord entered as into land forfeited to him by the said custom. And all the Judges held, that as to this the plea is well enough single, for the first is not effectual, but mere surplusage. (17) And also he has not alleged before in his plea that there is such a custom that the tenant should be admitted, wherefore it is not material; but the only cause of entry of the lord is the non-payment of the rent, upon which he has relied; wherefore, &c. And SHELLEY compared the case to a *Banbury* cheese, which is worth little in substance when the parings are cut off, for so this case is brief in substance, if the superfluous trifling which is on the pleadings

Co. Litt. 388. b. I
recovery in value, 9.

[Plowd. Query, 39.]

[See Shepherd's Touch-
stone, 181. 194.]

5. E. 3. 69. a. R. 4.
15. 26. H. 8. 2. Co.
Litt. 366. b. F. Voucher,
296. Bridg. Rep.
77.

3. 11. H. 7. 4. 7.

32. E. 3. F. Bar. 261.

[5. Bac. Ab. 119.]

4. Co. 22. b.

ings be taken away; for the intention of the condition was, that the obligor should warrant and save harmless *I. G.* * for the land sold, and that is the effect of the condition. (18) And then there is nothing more to be seen but how the defendant hath performed such intention, when he pleads that *I. G.* had and peaceably enjoyed it all his life. And it appeared to him that this was not well pleaded, for it is only argument, s. if he has peaceably enjoyed the land; therefore he hath guaranteed and saved him harmless; but he thought this was not sufficiently pleaded, for divers cases are ruled in the Books, that a man shall not plead by argument, but directly in fact. (19) As if in trespass for carrying away goods, the defendant would plead that the plaintiffs never had any goods, this is argumentative, that then the defendant is not guilty; and nevertheless it is no plea, and yet in that case the argument is infallible; therefore *à multo fortiori* in this case, here, where he pleads performance of the condition by a fallible argument, for although the obligee have peaceably enjoyed, this may be, and yet he may have cause of warranty, and also to be saved harmless; because if a man bring against him a plaint for the land, and he have cause to vouch, and the other be non-suited or barred, so that the obligee continue his estate peaceably, yet the condition is broken, and the suing of an action is not tortious, nor *contra pacem*, and whatever is not forcible is peaceably done. (And he examined, and dwelt much upon that word *peaceably*.) And also it might be that *I. G.* forfeit issues to the king, wherefore he is not saved harmless; and therefore this argument which is fallible is not well pleaded, wherefore, &c. (20) But if he had alleged that *I. G.* was impleaded, and he guaranteed and defended him, where he paid the issues for him, that would have been good: or if he had said directly, that no man had brought any action against him, and that he was not damnified by the king, or any one else, &c. that would have been well pleaded; but as it now is pleaded, the plaintiff ought to recover. But BALDWIN was of a contrary opinion; though neither I, nor any one else, I believe, understood his refutation.

3. H. 6. 13. a. Hob.
96. Dy. 34. 66. b.
11. E. 4. 4. 35. H. 6.
32. b. 2. Co. 4. 40.
5. H. 7. 12. b. 7. E. 3.
2. 8. H. 5. 9. 14.
H. 6. 1. 4. E. 4. 6. b.
34. H. 6. 43. b. 20.
H. 7. 4. b. 3. H. 6.
33. 8. H. 6. 23. a.
22. H. 6. 8. 50. 20.
H. 6. 3. a. 5. H. 7.
3. b. 2. Cro. 165. 36a.
363. 8. Co. 37. b.

[4. Bac. Ab. 92. 97.
1. Bac. Ab. 548. See
Cowp. 575. 578.]

2. E. 4. 15. a. Dy.
328. a.

6. H. 7. 8. 4. a. a.
Co. 4. a. Dyer, 148.
b. Cro. Jac. 363. Dy.
279. a.

(21) **I**F the parson of a church purchase a manor within his parish, now by this purchase and unity of possession, the manor which was titheable before is made untitheable, because he cannot pay tithes to himself; but if the parson make a lease of his parsonage and rectory to a stranger, then the parson himself shall pay the tithes of his manor to the lessee of the rectory: and if the parson make a feoffment of the manor, the feoffee shall pay tithes to the parson so enfeoffing, because tithes cannot be extinguished by any unity of possession, as a rent-charge may which is issuing out of the land; but tithes are due by the law of God *ex debito* for the occupation and tillage of the occupier in whose hands soever the land come, if it be not the hands of the parson himself. And all this matter was agreed by the Judges and Serjeants; but they differed in opinions, Whether if the parson let * parcel of his glebe for years or life, reserving rent, the lessee should pay tithes, or not? *Quare inde.*

If the parson purchase a manor within his parish, the unity of possession discharges it of tithes; but when the possession is severed, they revive.

2. Bullf. 184. Mo. 532. Davis, 6. a. 11. H. 7. 25. Dy. 357. a. 165. b. 12. Co. 24. a. Bro. Dimes, 17. 42. E. 3. 13. a. B. N. C. 178. 1. Inst. 3. a.

[Rayn. on Tithes, Introduction. LV. LVI. Cunningh. on Tithes, 35.]

Davis' Case, Prox. 7. fol. 1. Noy, 55. 132.

[Davies, 16, 17. Gibf. Cod. 661. 3. Bur. 1378.]

* [43. b.]

F (21) T. 4. Eliz. Rot. 619. in B. R. ϕ WRIGHT libelled in the spiritual court against *Champion* for tithes arising and coming out of the manor of *Newton Palence* in the county of *South Surrey*. CHAMPION brought a prohibition, and the matter of law was, A man devises his rectory except his own tithes, and afterwards grants his land, shall the grantee be discharged? HOBART thought not, because they are in the grantor by way of detainer.

T. 36. Eliz. Rot. 506. B. R. In an action of debt by ϕ *Hungerford v. Harward*, the condition was, that the defendant should suffer the plaintiff, &c. quietly to enjoy his manor of D. in the parish of S. (where the defendant was parson) and all his other lands, tenements, and hereditaments there in such and the like sort as the father of the plaintiff, &c. enjoyed, &c. without interruption, suit, or denial, &c. The defendant pleaded conditions performed; the plaintiff replied, that his father, for the space of &c. before, was seised of the said manor of D. and of a portion of tithes, by reason whereof he held the land discharged, and now the defendant has libelled against him in the spiritual court, &c. Resolved, that the condition was broken; for, notwithstanding the unity of possession, the manor and the portion of tithes out of the manor continue several, and both descend to the plaintiff, so that at the time of making the obligation, and afterwards, the manor is discharged of tithes; wherefore judgment was entered for the plaintiff, especially because of the word *hereditament* in the condition.

M. 31. and 32. Eliz. In prohibition between *Perkins and Hinde*, parson of *Babington*, [Cro. Eliz. 161. 11. Co. 13. b.] the case was, That the said parson, by deed indented, leased his glebe, with the profits and advantages thereto belonging, for ninety-five years, rendering five pounds for all exactions and demands whatsoever to the said rectory for the foresaid close belonging; and the question was, Whether the lessee should have the said close discharged of tithes during the term? And resolved by the Court, that the tithes shall not pay by such general words.

(22) **A** MERCHANT shipped certain cloth to be conveyed beyond sea for merchandize, and paid the customs and subsidies due for them to the king: and the ship, in sailing towards the foreign parts, was so tossed by

A merchant having paid the customs for goods exported, but which were lost by tempest, was permitted by the deputy of the customs tempests,

to ship as many more, duty free, upon an information brought against him, and issue joined that the customs were concealed *and* subtracted, if the jury mean to acquit the defendant, they should find that the customs were not concealed, *or* subtracted against the form, &c. as the defendant has alleged.

Flow. 1. Cafe. Dyer,
91. 165. 3. Bulstr. 5.
Vaugh. 161.

Dy. 92. 165. b. Contr.
Vaugh. 171. Davis,
9. 2. Moor, 675. Co.
Magna Charta, 58.
Rast. Custom. 1. 2.
last. 58.

9. H. 6. 13. 2. Davis,
fol. 9. b. 10. 11. H. 4.
35-

tempests, that the mariners, for the safety of her and themselves, threw the cloth into the sea, and brought the ship back again to the first port; and there he told all their misfortune to the deputy of the customs, and asked him whether he might not ship as much cloth again in lieu of the former so lost, without paying any further custom or subsidy for them. (23) And it seemed to the deputy that he well might, and he then gave him a licence to do it, and under that licence he carried out as much cloth, &c. without paying any custom, and thereupon an information was brought for the forfeiture of the last-mentioned cloth; and all this matter was pleaded in bar, with a traverse that the custom or subsidy *was not concealed or withdrawn, &c.* in manner and form, &c. Upon this the counsel for the king offered a demurrer in law, &c. (24) In the first place, we must see what a custom is, and what a subsidy, and by what law they are due to the king. And first, it seems that the customs for merchandize to be exported out of the realm is an inheritance in the king, and by the common law, and not given by any statute. And this appears by the statute 14. E. 3. [c. 21.] which was the first statute that speaks of any custom, and that statute does not give or limit to the king any custom, but abridges the custom which was paid for wool, and woollfells; for the words of the act are prohibitory, and say that no Englishmen shall pay for custom of a sack of wool more than half a mark, and for a last of woollfells half a mark; thus it is proved by this statute, that the customs are an inheritance in the king, by the course of the common law. And a subsidy is a tax assessed by parliament, and granted to the king by the commons, during the life of each king only, for the defence of merchants upon the sea: and no subsidy is given to the king by the statute made in the 1st [3d] year of the now king [chapter 7.] for cloths made and worked within the realm, but these and fells are omitted and excepted out of the grant, and therefore I know not by what law any subsidy should be paid for cloths, &c. And therefore the information is insufficient, for it supposes custom and subsidy also to be due to the king for the cloths, and that the moiety of the forfeiture shall go to the plaintiff; and I know not by what law he can demand the forfeiture of the moiety, for no statute gives it, and the common law gives the forfeiture for concealment of the custom

custom to the king only; wherefore, &c. (25) Also it appears further that the information is insufficient, inasmuch as the plaintiff made seizure and arrest of the cloths before * they were shipped, for they were only in a lighter; and then it might well be, that the custom should be paid to the king before the departure of the ship out of sight of the port, as a man shall be adjudged in prison who escapes, and is not out of the sight of his keeper. And so of beasts driven out of the sight of one who distrains; wherefore, &c. (26) And as to the matter in law, it appears reasonable that defendant should have so much cloth in lieu of the first; for by the common law of the realm, in many cases when a man has sustained a detriment or loss, and he makes another privy to it, he shall have recompence of a new thing for the old thing lost; as of a recovery in value upon a voucher to warranty: so it is where a man grants a feignory by fine, and before attornment the tenant dies without heir, or is attainted, and a stranger abates upon the land, the grantee shall have a *scire facias servitii*. (27) But afterwards *ex favore* the attorney-general waived the demurrer, and took issue that the customs and subsidy were not paid, or compounded with the collector, but *wholly concealed and withdrawn* against the form of the statute, &c. And it was found at *nisi prius* in the *Guildhall, London*, that the customs and subsidy due to our lord the king, &c. *were not concealed and withdrawn* against the form of the statute within specified in manner and form as by the information is within supposed. And whether this verdict was found for the king, or against him, was the doubt; for the verdict would be perfect if it had been that they *were not concealed or withdrawn* against the form of the statute, as the defendant hath alleged, if the jury intended to find with the defendant; but now the intention (as it seems) was to acquit the defendant of the concealment, but not of the withdrawing.

37. H. 6. 12. b.

10. H. 7. 26. a. 33.
34. H. 6. 53. 18. 8. 2.
13. 22. E. 4. 6. b. 9.
a. 49. 44. 48. E. 3.
28. 34. 21. H. 7. 40.
a. 9. 6. H. 7. 12. a.
7. 10. 11. 14. 15. H. 7.
1. 21. 4. 8. b. 17. b.

Stat. 33. H. 8. cap. 7.
Rast. Bratt. 2.
Stat. 1. Eliz. 29.

43. E. 3. 11. b. 46.
E. 3. 38. 23. E. 3.
Fit. Bar. 77. 18. E. 4.
10. Per quæ servitia, 9.
Litt. §. 579.

12. E. 4. cap. 3.

Dy. 260. a. 353. 2.

Gilbert's Case.

(28) **I**T was found by office, that one *Gilbert* held of the king as of his honour of *Plimpton*, and other lands as of his manor of *Dartington* in the county of *Devon*, which came to the hands of our lord the king by reason of

Lands holden of an honour or manor shall never be holden of the king *in capite*, though the honour or manor escheat to him for treason.

the

Davis, 59. 67. Dier,
58. a. Bro. Tenure, 65.
See M. 16. E. 3. 44.
2. Roll. Ab. 504. 513.
47. E. 3. 21. b. Plo.
241. a. 36. H. 8. 58.
Stat. 1. E. 6. c. 4.

Ley's Rep. 5.

Davis, 59. 66, 67. &
¶ 2. b.

Plow. 245. B. N. C.
213. N. B. 5. E. 175,
176.

Bro. Tenure, 94.

* [44. b.]

Lit. 156. 19. R. 2.
Fit. Gard. 165. 47.

Fulb. 22, 23. B. N. C.
213.

Finch, 35. b.

18. Eliz. 345. a. B. N. C.
114. Br. Livery, 58.

Dyer, 58. 359. 6. E. 3.
56. Fit. Gar. 61. 10.
45. F. 29. b. 19. E. 3.
Fit. Age, 46. 6. H. 4.
1. 48. E. 3. 11. N. B.
31. 2. E. 4. 6. 1.
E. 3. Fit. Avowry, 168.
4. E. 3. 29.

Cra. fol. 177. 10. Co.
64. 5. 47. 49. E. 3. 4.
21. b. 24. b. 9. Co.
22. b. 5. Co. 25. b.
Discrets, 5.

the attainder of *Henry Courtney* late marquis of *Exeter*, attainted of high treason by the common law, and also in parliament. The question was in the exchequer, Whether this be a tenure *in capite*, or not? And it seemed no tenure *in capite*; for the tenures in chief began in ancient times, upon the grants of the king, to defend his person and his crown and royalty against enemies and rebels. (29) And the words *de prerogativa regis* c. 1. prove this: The lord the king shall have the custody, &c. so that however they have held of the king from of old of the crown, yet the king can at this day make a tenure *in capite* of him if he reserve it to his person, and as a service in gross; but if he reserve the tenure as of his manor, or honour, or castle, clearly this is no tenure *in capite*; for the services shall be regardant to the manor, honour, or castle, and * not about the person of the king. (30) And also the tenure *in capite* is the most high and honourable service in the law, inasmuch as it is done to the chief head of the body of the realm; and therefore every grand serjeanty is a tenure *in capite*, for that manner of tenure is of none but of the king. And there is also another ground in tenures *in capite*, s. it ought to be immediate of the king, and must commence and take its original creation by the king himself, and not by any of his subjects; for the feignory and tenure which is created by a subject can never after by any means become a tenure *in capite*, or have any prerogative annexed to it. (31) And therefore if the prince, before the statute of *quia emptores terrarum*, had made a feignory of his person, and then had become king, that is not a tenure *in capite*. And if there be king, lord, mesne, and tenant, and if the mesne hold of the king *in capite*, and then the mesne die without heir or be attainted for felony, or die the king being his heir, or the king purchase his mesnalty, yet that will not make the tenant hold of the king in chief, for the tenure by which he holds was not derived from the crown, but through a mesne, yet there the feignory is gone, and the mesnalty comes in lieu of it. (32) And yet our Books differ, where the king comes to an escheat as lord, and where he comes to it as king of *England*; for if he come as lord, he shall be in no other situation than a common lord;

(29) The king may create a tenure *in capite* at this day; as a grant of land to hold of him without expressing any services, this is *in capite*. 29. H. 8. Bro. *Livery*, 57. So by express words the king may reserve a tenure *in capite*. 9. *Jac.* Davis, 66.

but as king it is otherwise, and he has his privilege in it; as in the case in 6. E. 3. 32. A man held a manor of the king, to which manor royal franchises were appendant, s. to have the escheats of all treasons of such as held of the manor: and one held another manor of the said manor to which an advowson was appendant, and he who held the manor of the king was attainted of treason, upon which the king seized; and afterwards he who held the other manor to which the advowson, &c. was also attainted of treason, upon which the king seized, and afterwards granted the manor which was holden of him together with the advowsons belonging to the same; and by the opinion there the advowson does not pass with that manor, but is appendant as before. But it was there holden, that the royal franchises were extinguished by the escheat, and rejoined to the crown from which they proceeded, for no one can give or grant royal franchises except the king, but a subject may create a tenure, and so there is a difference. (33) And no man will deny, that if a manor or honour which is holden *in capite* of the king, come to him by escheat of treason, still the honour or manor continues an honour and manor as they were before; and if the tenants of the honour or manor should hold now *in capite*, then should their tenures and services be severed from the honour or manor and made in gross, and then in consequence the manor be dissolved and destroyed. (34) Also the course of the Register in the nature of the writ of right proves this; for if a writ of right be to be brought for lands holden of the king *in capite*, the writ shall be directed to the sheriff, and is then called a *præcipe in capite*; but if of the king as of the honour or manor, the writ shall be directed to the bailiff, &c. And upon * the declaration of the nature of this writ M. FITZHERBERT, in his *Nat. Brev.* [5. b.] has shewn his opinion, that no tenure can be called *in capite*, if it be not a feigniory in gross, and merely holden of the person of the king, and not as of the manor, &c. And he blames the use and course of suing out liveries for such lands, and that as erroneous; and this he says at the beginning of his book. (35) And note also, that it is not reasonable that the tenant paravail should be prejudiced in his tenure by the treason of his lord; but where there is a default in the tenant it is otherwise, as if he forejudge his mesne, or obtain a recovery of the mesne, and the like. And note further, that the king can

Plow. 33a. b. 43. E.
22. b. Plow. 219. a.
43. Aff. 20. 2. 9. l.
15. b. 5. b. 15. E.
7. b. Bro. Quo Warr.
11. Co. 72. Stat. Mag.
Chart. c. 31. 5. E.
4. Prærogat. 20. 4.
E. 3. 24. b. Davi
67. a. Dy. 359. 3.
H. 6. 9. Fit. Bar. 51

[1. H. H. P. C. 254

29. H. 8. Ten. Bro. 61
N.B. 5. K. 1. l.

Keilw. 200.

* [45. a.]

B. N. C. 230. Cro.
86. a. 21. E. 3. 41. b.
Tenures, 16.

1. E. 3. 6. a. 18. E. 3.
38. F. Gard. 37. 115.
7. E. 4. 12. a. 19. Eliz.
359. b. 2. E. 4. 6. a.
10. Aff. 29. 36. H. 6.
7. a. 33. E. 3. Gard.
12. 7. E. 3. 9. P.
Avowry, 143. Davis,
67. a. 18. E. 3. 16.
21. E. 3. 41. b. Fit.

Awry, 85. 224. 99.
24. d. 6. 12. b. 8.
H. 12. b. 13. a.
40. 3. 22. b.

Cro. 71. Co. Lit. 98. a.
99. " E. 4. 12. a.
15. 3. Fit. Confirm.
man, 8. Lit. 141.
4. 3. 19. b. Perk.
§ 2. 2. Leon. 197.
Co. 101. 26. Aff.
38. 6. 12. E. 4. 3. a.
Pl. 240. by Carus.

[V. Ab. Tenure L. 2.
Ba Ab. Tenure E.
Wd's Infl. 175, 176.]

can by no way grant or sever the tenure and feignory *in capite* of the crown, for no subject can take it of his grant with such prerogative. (36) And therefore if the king make a release to his tenant *in capite* to hold by a farthing, and not *in capite*, this is a void release, for this is merely incidental to the person and crown of the king, and has such prerogative as cannot be holden of any subject; as the tenant in frankalmoign cannot hold of any other than the donor and of his person, because it is a special tenure. Also if the king at this day make a gift in tail to hold of him *in capite*, and afterwards grant the reversion of the land to another in fee, neither the tenure or service pass to the grantee, but remain to the king, because they were not incident to the reversion, but to the person of the king.

Michaelmas Term,

31. Hen. 8.

a condition in a lease not to aliene to A. enation to B. who allies to A. is no breach. Wilf. 234. 380. 530. Ep. Touch. 141, 142.]

. & Stu. 123. b. 124.
H. 8. 6. b. 1. Mar.
a. 152. 65. Co.
tt. 223. b. cont. *fi soit intentione.* Dy. 281.
Co. 76. b. 3. H. 4.
b. 3. Bulstr. 43.
at. 20. 2. Saund. 368,
59, 370. 2. Leon. 35.
Co. 106. Jon. 309.
r. Aff. 6. 1. Rol. 673.
Co. E. 4. 18. b. 38.
3. 7. a. 11. E. 3.
Affist. 86. 27. H. 8.

(1) A LEASE was made to one for term of years upon condition "that the lessee should not aliene his term to J. S." and he alienes to R. B. who alienes to the said J. S. It was moved in C. B. Whether the condition be broken? And it should seem not, because every condition is taken strictly; for if a man make a feoffment upon condition that he shall not enfeoff J. S. and he die, and his heir enfeoff J. S. this is not a breach of the condition. And it is like a reservation; for if a man make a lease for term of years, rendering certain rent to the lessor, in that case his heir shall not have this rent, because he is not named in the reservation. (2) But it was agreed by SHELLEY and CONINGESBY for law, that if a man make a lease for years, rendering certain rent, without saying, to the lessor, or to his

(1) *East. 38. Eliz. B. R. Judith Crispe v. Robert Frier*, [2. Roll Ab. 430. N. pl. 5.] n trespais per Cur', If a lord of a manor grant a copyhold in fee, rendering to the said lord thirty-five shillings and eight-pence, and doing the rightful services, the heir shall have his rent. H. 33. *Eliz. Boucher and Richmond's case* in C. B. [Ow. 9. Cro. Eliz. 217.] One Cowel made a lease for years, rendering ten pounds rent to him, his executors, and assigns, during the term; and it was adjudged that the heir should not have the rent; but contrary to this has been adjudged. [See *Sacheverell v. Froggart*, E. 23. Car. 2. Saund. 367. Sir Tho. Raym. 213. 2. Lev. 13. Co. Lit. 47. note 8. Com. Dig. Rent, B. 5. Bac. Ab. Rent, H.]

heirs,

heirs, yet the lessor * and his heirs shall have this rent, because it is reserved as long as the estate shall continue. And it is like the case in 6. E. 2. [*Fitz. Voucher*, 258.] where a man made a feoffment, and bound himself and his heirs to warranty without saying to whom he would warrant, still the feoffee and his heirs shall have advantage of the warranty; but if the warranty were more certain as to the feoffee only, then his heirs should have no advantage thereof, for there it is expressed in certain to whom he will warrant, and as long as, &c. But WILLOUGHBY and JENNEY said, that in the case of reservation of the rent upon lease as above there was little difference.

29. a. 49. H. 6. 12. b.
9. Eliz. 264. b. Cro.
28. b. 1. Cro. 239. 139.
Reg. 613. 14. H. 6.
26. Br. Reservation, 15.
21. H. 7. 25. b.
[*Flow. Rep.* 171. *Que-
ries* 39. 231. Co. Lit.
383. b. 5. Com. Dig.
423. *Shap. Touch* 181.
204.]
5. Co. 112. a. 10. E. 4.
18. b. Perk. § 697.
30. H. 8. 42. a. 22.
E. 4. 26. a. Cro. 108.
14. H. 4. 13. Br. Gar-
rany, 81. 22. H. 6.
22. 3. Bul. 328. 1.
Rol. Rep. 214.
28. E. 2. F. Voucher,
262.

Parry against Harbert.

(3) IN the court of augmentations the case was thus between one *Parry* and *Harbert*: A lease was made for a term of years, upon condition, that if the lessee during his life should assign his term to any other without the assent of the lessor, it should be lawful for the lessor to re-enter. The lessee devised his term by his will to another without the assent, &c. Whether this was cause of forfeiture? was the matter, because during his life the assignment did not take effect. And yet R. BROOK and HALES the Master of the Rolls thought, that this is a forfeiture, for the devise, when he is in, shall be said in by the assignment which the lessor made during his life; and took a diversity between the assignment which the law makes and the assignment which the lessee himself makes: for the case would have been clear, that if the executor had the term, that is no forfeiture, because the law makes the assignment; but otherwise it is in the other case, &c. *Quære*, because no more was said at that time.

Lease for years, with a clause of re-entry, if lessee during his life should alienate his term without the assent, &c. Whether a devise of it without assent be a forfeiture? *Re.*

Devise shall be said to be assignee. 34. H. 6. 6. a.
2. And. 11. 3. Bulfr. 47.
Went. 44. Styles, 409.
10. Co. 86. Pal. 498.
5. Eliz. 221. a. B.N.C.
4. 69. 15. H. 7. 11.

[*Ambl. Rep.* 48a.]

[4. Leon. 11.]

3. E. 6. 65. b. 74. 6.
Co. 46. a. 1. Co. 112.
[*Shap. Touch* 141,
142. 2. Term Rep.
485.]

(3) H. 36. Eliz. B. R. [*Qva.* 14. Cro. Eliz. 330, 331.] *Coke* made a lease to *Tamson* for ninety years, upon condition that if he should demise in any other manner than from year to year, it should be lawful for the lessor to enter; the lessee devised it by will to one of his younger sons; and it was resolved, that in strictness of law this is a breach of the condition. And so also was the case of *Barton and Horton* [Cro. Jac. 74.].

14. Eliz. & Lord Windfor and Barry. Lease was made to Barry upon condition that he should not assign his term without the assent of Lord Windfor; Barry devised his term to his son and wife, and made them his executors; and in that case it was said, that if they had not been executors the condition would have been broken.

M. 29, 30. Eliz. B. R. *Knights* case ruled [Cro. Eliz. 60.], that the devise was a breach of the condition.

Minors' Case.

T. M. makes a feoffment upon condition to re-enscuff the said *T.* and his wife in tail special, remainder to *T. M. my son*, remainder to *S. my daughter*, and the feoffees re-enscuff in those very words: the heir may not enter as for a breach of the condition.

2. Co. Julius Winnington's case.

4 H. 6. 1.

* [46. a.]

Dy. 30. 42.

2. H. 4. 5.

14. H. 8. 21. a. 8.

H. 7. 8. per Kelle,

Cro. 60.

Infra, 56. b. 4. H. 7.

4. a. 20. 22. E. 4. 19. a.

18. a. 11. 20. H. 7.

21. b. 4. b.

3. H. 7. 4. b. 36. H. 6.

10. a. 5. E. 6. 70. a.

(4) **THOMAS MINORS**, Esquire, tenant in tail, enfranchised by deed *J. N.* and *R. B.* upon condition that they should make estate back again to the said *Thomas* and his wife, and to the heirs of their two bodies begotten, remainder to *Thomas Minors my son*, and the heirs of the body, &c. remainder to *Sibilla my daughter*, &c. The feoffees made a feoffment by deed reciting the first deed by these words, *s.* "We have given and granted to the said *Thomas Minors* and *M.* his wife, and the heirs of their bodies between them begotten, and for default of such issue then to remain to *Thomas Minors my son*, &c. and for default, &c. to remain to *Sibilla my daughter*, &c." *Thomas* the father died, and the said *Thomas* the son within age entered, and upon this matter the dispute was between his stepmother and him; (5) and, Whether his entry for the condition broken was lawful, or not? was the question (a); for the opinion was, that the remainder was given to a strange person who was named in the first deed, namely, to *Thomas M. my son*; but this cannot be understood any other person, for the words *my son* are void, for there were two feoffees, and neither of them named *Minors*, but *Sibilla my daughter* may be intended the daughter of one of the feoffees, but she cannot be understood the daughter of the father. (6) And **BROMLEY** thought that the heir cannot enter for the condition broken, inasmuch as he who was privy to the condition, and who ought to have taken advantage of it, has accepted the estate of the feoffees as they made it, and for this reason the condition is extinct. But otherwise it would have been, if the condition had been to be performed to a stranger; there the condition should have been performed strictly. *Sed quære*, Whether the condition be not only suspended during the life of the father? *Quære inde bene*, for the parties agreed by the arbitration of the two Chief Justices **MOUNTAGUE** and **BALDWIN**. But the opinion of **MOUNTAGUE** was, that the entry of the heir was not lawful, because the party who made the condition was party also to the breach of the condition.

(a) Equity will relieve against the heir entering for the breach of a condition. 1. Rep. in Chan. 85, 86.

Newman and Danage's Case.

(7) **HENRY MILBOURNE** and *M.* his wife, late the wife of *R. Yorke*, Serjeant at Law, made a lease to *H. Newman* and *J. Danage* by these words, "to have and to hold the said pasture called *Sciles Marsh* in *Hungestridge* in the county of *Somerset* to the said *H.* and *J.* for the term of their lives jointly, and of the longer liver of them, and his assigns who first should happen to die, during the life of him who should survive, and no otherwise." *Quære*, Whether by reason of this word *jointly* they are restrained from making partition? And several thought, not. Also *quære*, Whether he who first dies can assign his moiety or the entirety during the life of his companion; and, of what effect the words are? And several here thought that the survivor should have the entirety, if no severance were made during the life of the other.

If land be leased to *A.* and *B.* for their lives jointly, and for the life of the longer liver, and to the assigns of him who first dies during the life of the survivor; Whether the word *jointly* precludes them from making partition? And, Whether he who first dies can assign his moiety or the entirety during the life of the other? If there be no assignment, the survivorship takes place.

4. Co. 73. b.
1. Co. 84. b.
30. Aff. 8. 3. E. 6. 67.
1 Inst. 169. a.
[Vide 31. H. 8. c. 1. & 32. H. 8. c. 32. Co. Lit. 191. a. & Mr. Hargrave's note (1).]

(8) **I N B. R.** the case was, That a man was stricken in the county of *E.* and died in the county of *Cambridge* of the said stroke, and his heir brought appeal in the county of *Cambridge* where the death happened, and the defendant pleaded not guilty; and, Whether the venue to try the issue shall be of the county of *C.* or *E.* or of both? And they were of opinion, that the jury shall come out of both counties, according to 3. Hen. 7. [12. a.] & 4. H. 7. [5. b.] And yet it was said by the clerks, that a man was stricken in *Middlesex*, and died thereof in *London*, and that the issue was tried by men of *Middlesex* only; but to that it was answered, that the reason was, because *London* and *Middlesex* cannot join. And observe further in this mode of trial, no *nisi prius* shall be awarded into the counties, but that the jurors of both counties must come here into this court. *Quod nota.* And also the view of each county shall be *de corpore com.* *Nota hoc.*

In appeal of murder, where the blow is given in one county and the party dies in another, the jury shall come from the body of both counties, and the trial must be in *B. R.*

3. 4. 6. 7. 20. H. 7.
12. a. 5. b. 10. a. 8.
20. 29. H. 8. 40. b.
Stat. 2. E. 6. c. 24.
Rast. Tryal. 15. 43.
E. 3. 18. a. 10. E. 4.
10. b.
7. Co. 2. 11. H. 4. 64.
& 49. 21. H. 6. 3.

[2. Rol. Ab. 603. Priv. Lond. 79. But see a. Wilk. 136.]
Dy. 50. b.
[See ante, 40. b. pl. 71. and note (a) there.]

Herreyong and Goddard's Case.

If a bishop lease to two, and by a second lease let the same lands to one of them, the second only being und. r the chapter seal; Whether the first lease be void by the bishop's death? *Qr.*

10. Co. Bishop of Sarum's case. 5. Co. Ives's case. 1. Cro. 96. 3. Cro. 690. Jon. 406. 2. Cro. 173. Dyer, 236. b. 51. b. B. N. C. 321. 381. 14. H. 6. 26. 14. H. 8. 12. 21. H. 6. 25. 3. Co. 65. a. 78. a. 21. H. 7. 38. b. 21. E. 4. 5. a. 37. H. 6. 4. a. [Doug. 53. Covp. 483. 1. Term Rep. 95. Co. Lit. 215. a.]

* [46. b.]

B. N. C. 16. 172. 321. 831. 14. H. 8. 14. by Brudenel. 7. El. 239. b. Plow. 30. 264. 5. H. 5. 10. b. 11. E. 3. Fit. Juris Utrum, 3. C. N. B. 54. 1. Inst. 49. b. 5. Co. 11. b.

(9) JOHN late Bishop of London leased certain lands in Stepney by deed indented to one Richard Herreyong and William Goddard for term of years, rendering certain rent to him and his successors; and afterwards the Bishop made a new lease of the entirety for several years under the chapter seal, and by their common seal, to the said Goddard, rendering rent; and afterwards the Bishop died: Whether by his death the first lease was void in all, or not? was the question. And it was holden by many to be void; yet they agreed, that an abbot with the bishop, or those who have the estate of inheritance, as tenant in tail, may make a lease for years rendering rent, and by their death the lease is not void, but voidable at the pleasure of the successor or of the issue, for if they accept * the rent the lease is good. But of a parson, or tenant for term of life, it is otherwise; but here the will and pleasure of the successor to make the first lease good by acceptance of rent, is bound and restrained by the lease made by the predecessor and the chapter. Therefore the demise is void by the death of the Bishop; and the case was moved in the Bench, and the Judges doubted of it, for some said that the lease was surrendered for the moiety, and enures as for the residue. *Sed quare legem bene*, for the parties submitted to the arbitration of T. ARMERAR by bonds, who awarded that Goddard should pay *Xxx* thirty pounds for his favour, &c.

(9) *East. 6. Eliz. C. B. Powtrel's case* [Owen, 83. Dal. 65.]. A woman, tenant in tail, made a lease for years not warranted by stat. 32. H. 8. [c. 28.] and took husband, by whom she had issue, and died; resolved, that during the life of tenant by the curtesy the issue could not avoid this lease; and in case tenant by the curtesy have surrendered to the issue, yet was it resolved against the issue. [3. Bac. Ab. 319.] Co. Litt. 326. a. a like case.

It seems, that it is a surrender for a moiety, and then *quare* if the whole rent of the first lease be not gone, or whether it shall be apportioned? for if the whole be gone, then the first lease is void by the death of the lessor; but if it be apportioned, then remains the liberty of acceptance to the successor, and so it is not void by the death of lessor. Then *quare*, if the first lease is not void by the death, Whether the second was not void at its commencement for so many years as the first has continuance? for it should seem it was. And then by the death of the Bishop the successor shall enjoy the moiety, and Goddard only the other moiety. That acceptance of a second lease is a surrender of the first. 14. H. 8. 15. a. 37. H. 6. 18. a. 4. H. 7. 10. 22. E. 4. 37. a. Post. 140. [and 141. 280. a. 3. Bac. Ab. 459. &c.]

Easter Term,

31. and 32. Hen. 8.

Heyward's Case.

(1) **THE** Abbot and Convent of *Keinsbam* in the county of *Somerſet* made a grant by indenture, reciting, "Whereas one *Edmund L.* holds and occupies a certain tenement, with lands, meadows, &c. in *Batwel*, for the term of his life, &c. for a rent of eight ſhillings by the year, we the ſaid Abbot and Convent, in conſideration of twenty pounds paid in the name of a fine, have given and granted, and by theſe preſents do demise to the ſaid *Thomas Heyward* the remainder in the ſaid tenement, with all the lands, meadows, &c. to have and to hold the ſaid remainder in the ſaid tenement, with all lands, &c. to the ſaid T. and his aſſigns, immediately after the deceaſe forfeiture or ſurrender of the ſaid L. for the term of twenty years thence next enſuing, &c." *Quære*, Whether by the word *remainder* the *reverſion* paſſes, or not? *Alſo*, *Quære*, Whether it be neceſſary to have attornment, or not, of the leſſee for life?

A man leaſed for life to A. and afterwards, by indenture reciting the ſaid leaſe, demiſed the remainder to B. to have the ſaid remainder for twenty years next after the determination of the firſt leaſe: Whether, under the word *remainder* the reverſion paſſes, and whether attornment be neceſſary? *Qz.*

27 H. 8. 15. a. 10. E. 3. F. Feoffment. 76. Dy. 125. b. 21. H. 7. 37. a. 21. E. 4. 39. b. a. H. 6. 4. b. 1. H. 5. 9. Plow. 157. 170. b. 10. E. 3. 46. a. Dy. 58. b. 26. a. 1. Inſt. 299. 37. H. 8. Br. Attornment, 41. B. N. C. 308. * 30. H. 7. 13. a. Pl. 141. b. Dy. 124. 377. a. 38. H. 8. 26. a. 18. E. 3. 28. a. Plow. 379. [Sheph. Touchſt. 84. 248.] [4. Ann. c. 16. § 9. Dougl. 282.]

Guier's Case.

(2) **JOHN GUIER** was indicted before the coroner, *ſuper viſum corporis*, of the death of *Emelin Guier* his wife. And the indictment was, That the ſaid *Emelin* was in the peace of the lord the king "until the ſaid *John Guier*, huſband to the ſaid *Emelin Guier* of *Hambridge* aforeſaid in the county aforeſaid, yeoman." And whether thoſe additions of place and deſcription can be intended of and referred to *John Guier*, or to his wife, was moved in abatement of the indictment; for the relation ſhall be to the laſt antecedent. And therefore the caſe is in 9. E. 4. [48. a.] that a man was indicted of felony by the name of *I. S.* of *D.* in the county aforeſaid, ſervant to *W. B.* in the ſaid county, yeoman, and for want of ſufficient addition to *I. S.* he was diſcharged from the indictment, for yeoman ought to be

Indictment *ſuper viſ. corp.* that the ſaid *Emma* was in the peace, &c. until the ſaid A. the huſband of the ſaid *Emma*, of H. aforeſaid in the county aforeſaid, yeoman, &c. And good without "late the huſband." And the addition of yeoman, though *Emma* be the next antecedent, muſt be referred to the huſband.

1. Keb. 639. 1. Sid. 247. 4. 11. H. 6. 1. 33. b. Cro. Car. 750. Ante, 15. b. Finch. 3. b. 5. 7. E. 4. 4. 32. 10. 3. H. 6. 31. b. Br. Addition, 30.

[2. Hawk. Pl. 372.]
 24. E. 4. 7.

referred to the master, and not to I. S. and servant is not sufficient addition; wherefore, &c. (3) And see the like in M. 6. E. 4. [3. b.] in an indictment. And there is also a precedent in B. R. about Mich. 15. or 16. Hen. 8. before FINEUX, That one * *Sibella Batersby, late of T. in the county of York, the wife of John Batersby, late spinster*, was indicted of felony and murder; and for want of addition she was discharged; for spinster shall have relation to the last antecedent, to wit, *J. B.* And so here, &c. And also for another cause the indictment * was challenged, for it may be well enough understood by the indictment that the wife is not killed, but is in life, and so repugnant in itself, because the said *John Guier* is called the husband of the said *Emelin* where it should be late husband, for husband is correlative to wife, for he cannot be husband but in respect of his wife, therefore it may be understood that the espousals still continue; wherefore, &c. (4) And the Judges were in doubt for a long time; but the better opinion amongst them was, that notwithstanding the exceptions, the indictment was well enough, and cannot be otherwise intended but that the word yeoman relates to the husband, and this of necessity, for yeoman is not an addition for a woman; and the place also shall relate to the husband, because that word yeoman which comes afterwards relates to the husband. (5) And it is not like the case of *Sibella Batersby*, which is mentioned above, for spinster is an addition indifferently to a man as well as to a woman; for by SPILMAN, in *Norfolk* there are many men who are worsted spinsters; wherefore, &c. And as to the other exception, it appears fully that the wife was found dead *super visum corporis*. Wherefore, &c. the best shall be taken for the king. See the like, M. 4. H. 6. 8. [4. b.] which accords with this opinion of the Judges, &c.

* [47. a.]

4. H. 6. 5. 2.

[2. Hawk. Pl. C. 272.
 2. H. H. P. C. 176,
 277.]

Trinity Term,

32. Hen. 8.

Banister against Benjamin.

(1) ONE Banister brought trespass against one Benjamin, and the trespass was alleged to have been done in a messuage and garden in D. and they were at issue upon a disseisin of the plaintiff by the defendant before the supposed trespass. And now the jury appeared, and it was given in evidence for the plaintiff to prove the disseisin, that one W. Benjamin was seised of this messuage and garden, and enfeoffed the father of the plaintiff thereof by deed in the 16th year of H. 7. by virtue whereof he took the profits, and died seised; and thereupon it descended to the plaintiff as son and heir, and he entered, and was seised until disseised by the defendant. (7) And the defendant (to prove his entry lawful, and no disseisin) shewed a recovery against the plaintiff himself, in a writ of intrusion brought by himself, in the 22d year of Hen. 8. And there the record was read, which was of one hundred acres of land, twenty acres of meadow, and forty acres of pasture in D. and did not mention either messuage or garden; wherefore the plaintiff said, that the place where the trespass is supposed is not contained in that record, for the form of the Register ought to be observed, which expresses particularly how tenements ought to be demanded, s. by the name of messuage, garden, &c. (8) For if a man have a title to a formedon in reverter of an acre of land, and the tenant in tail build an house upon the land, and die without issue, the donor should demand it by the name of a messuage. And this was the opinion of SHELLEY, BALDWIN, and MOUNTAGUE, Chief Justices, for their opinions were asked; but the opinion of SPILMAN, LUKE, and MARVYNE, was contrary, for a man cannot recover the land and foil, * but of necessity he ought to recover the edifices built upon it. (9) And afterwards SHELLEY changed

Trespass in an house, issue joined upon a disseisin of the plaintiff, and defendant, in evidence to prove no disseisin, shews a recovery of lands, with an averment that the house was built afterwards. The jury was charged to find the disseisin, if they did not find the building upon the land, but if they did, to pray the direction of the Court.

3. Cro. 113.
Plow. 168. Fit. Entry,
80. But F. Formedon.
29. seems otherwise,
and Feoffments and
Facts, 79.
39. H. 8. 2. N. B.
192. D.
Br. Denland. 14.
Co. Litt. 4. 2. 2. B. 4.
17.

[By a recovery of lands
a house will pass]

[1. Burr. 145.]

[* 47. b.]

his

(9) In the argument of *Eure and Haydon's case* [Cro. Eliz. 476. 658.], T. 38. Eliz. B. R. Rot. 359. or 559. TANFIELD cited one *Andrew's case*, where it was agreed that if A. bring a *præcipe*, &c. of one hundred acres in D. he shall have one hundred acres by measure according to the statute [33. Ed. 1. st. 6.]; but if a man bargain or grant one hundred acres in D. to A. he shall have one hundred acres according to the computation and use of the country: so mark the difference between a recovery and a grant. And

200 H. 2. E. 3. 8.

his opinion; and because of this diversity of opinions the Court desired the Serjeants to demur in law, and discharge the jury; but the plaintiff's counsel would not consent to it, for they said, that their case was clear enough, for they did not wish to claim any thing of the said one hundred acres of land, twenty acres of meadow, and forty acres of pasture, but would leave them to the defendant according to the recovery. But they said, that besides and above the one hundred and sixty acres, this messuage and garden were there, so that the messuage is not built upon the said one hundred and sixty acres, and the defendant averred the contrary; wherefore SHELLEY, of the discretion and with the consent of the Court, charged the jury in such form to give their verdict, s. to enquire if any house be built upon the said one hundred and sixty acres, and if they found it so, that they should not give any precise verdict, but pray the direction of the Court; and if they found the contrary, to say precisely that the defendant disseised the plaintiff, and note this charge. See the same, East. 36. and 37. [H. 8. *infra*, 59. pl. 13.] for *non est factum*.

4. Co. 87. b. 9. Co. 34. a. Moor, 858.

[5. Bac. Ab. 283. (D)]

also it was said by TANFIELD, and denied by none, that if *A.* recover fifty acres in *ejectione firmæ*, the sheriff shall make execution according to the statute *de terris mensurandis*, and not according to the custom of the country; and that this had been so adjudged in *M. R. MASON's* case, E. 4. Jac. in the argument of *Castle and Warner's* case: for the judgment in the king's court ought to be upon a certainty. It was adjudged between *Allen and Hayes*, [Cro. Eliz. 234. 1. Leon. 152. Poph. 13.] upon a *cui in vita* in *C. B.* which was affirmed in error, T. 35. Eliz. in *B. R.* and there adjudged that he ought to demand it by name of a messuage, as it is now.

Lease without impeachment of waste; conditioned for re-entry in case of waste. Whether the condition be void for repugnancy?

Bridg. Rep. 100.

Post. 222. a. 319. a. 3. Co. 72. 11. Co. 30. b. 4. Co. 63. 10. Co. 42. a. Fit. Wast. 39. Flow. 235. b.

[Sheph. Touch. 128, 129.]

(11) SERJEANT ROW put this case to the Judges of *C. B.* A lease is made for term of life, *without impeachment of waste*, and if it should happen that he commit waste, then it should be lawful for the lessor to enter; and he did commit waste; Whether may the lessor enter, or not? And the Judges were in doubt of the case, but SHELLEY thought the condition void, because it is repugnant to the grant to be discharged of waste; but some thought that these words *impeachment of waste* shall be understood that he shall not be impleaded or punished for waste by action, &c. Therefore *quære*; see 9. H. 6. [35. 2.] provided that he do no voluntary waste in the houses.

(12) **A**N obligor died intestate, the ordinary granted administration, and the administrator made his executor and died—it was moved by SAUNDERS that an action of debt lies against the executor; but SHELLEY, *Justices*, thought the contrary, for the ordinary must grant a new administration. *Quere.*

The executor of an administrator is not suable for the debts of the intestate.

26. H. 8. 7. a. 5. Co. 91. b. Post. 112. b. 174. 208. a. 24. E. 3. 54. b. 34. H. 6. 14. a. Fit. Administration, 3.

9. 20. E. 4. 1. b. Reg. 907. 1. Sid. 9. [2. Black. Com. 506. and Wentw. Exec. Suppl. 117. &c. See 1. Wilk. 258. and stat. 4. and 5. W. and M. c. 24. § 12.]

(12) *E. 3. Jac. B. R. & Mary Weeks* devised two hundred pounds to her daughter, and made her son *Mark Weeks* her executor, and died; he renounced; and *Roger Weeks* administered *cum testamento annexo*, against whom the devise recovered in the spiritual court, upon *non devisavit* pleaded. The defendant made his wife executrix, and died; she prayed a prohibition to stay execution, and by FOSTER, This judgment ought to be satisfied out of the goods of the first intestate, which are with the executors of the administrators. But administration *de novo* ought to be granted *de bonis non* to one against whom execution shall be sued.

M. 7. Car. B. R. Beaumont v. Long. [Sir W. Jones, 248. Cro. Car. 208. 227.]

(13) **T**WO vills were adjoining, and between them lay a large field. And one who had land in one vill had common there with the tenants of the other vill, and so one had common, and lands with another. It was moved, Whether, if such person were to make title to this common, he should make it as to common appendant, or by cause of vicinage? And it was holden by the Court, that this was common by cause of vicinage. And SHELLEY thought, that if there be three vills, *D. S. and U. and S.* is in the middle between them, the vills of *D. and U.* cannot intercommon *causa vicinitatis*, for they are not adjoining vicinities. (14) But BALDWIN *à contra*, and took this diversity: If one vill have common in another vill during one season of the year, and the other have common in * the first during another season, or every second year, that is not common because of vicinage, for they do not intercommon all at one time, but at different times.

If one who has land in one vill have common with the tenants of an adjoining vill in a field lying between them, he must make title *by cause of vicinage*, and not as *appendant*.

7. E. 4. 26.

22. H. 6. 51. 4. Co. 36. b.

2. Inst. 474.

* [48. a.]

Post. 14. and 15. El. 316. b.

[Vin. Ab. Common. K. Bac. Ab. Common. A. 4. 2. Black. Comm. 33. 34.]

(15) **H**ALES put this case: A man is bound to a dean in twenty pounds, *to be paid to the said dean and*

If a bond be made to a dean, to pay to the said dean and his successors.

(15) *M. & 41, 42. Elin. C. B.* A bond was made to the bishop of Bath and Wells, and his successors, and adjudged that the successors cannot have action of debt upon it; but they agreed that the successor may have covenant upon a lease for years, which is in the realty. [Co. Litt. 46. b. *contra*.] The doubt was, because after the death of such parson, being a corporation sole, the bond is due to nobody, and so suspended; and a personal action once suspended is gone: but there is no rule but sometimes fails.

for, Whether, upon the dean's death, his successors or executors shall have debt upon it?

3. Cro. 464. 20. E. 4.
2. a. 18. Eliz. 350. a.
4. Co. 65. a. 3. H. 7.
11. Bro. Corporation,
60. 10. Co. 31. b.

27. H. 8. 15. a. 21.
E. 4. 7. b. 47. E. 3.
23. b.

[See Co. Litt. 9. a. and
Mr. Hargrave's note
(1), and 42. Co. 106.]

his successors; Whether the executor or the successor shall have debt for this? was the doubt. And SHELLEY thought that the successor should have it, for a debt may run in succession. And the dean has a corporation to him and his successors as well as to him and his heirs, or executors. So is it of a bishop, if the successors are named in the bond, his executor shall not have the action; but it is otherwise of a bond made to a mayor and his successors, or to two churchwardens and their successors, for they have no capacity to take to their successors, &c. otherwise would it be of an abbot or prior. And BALDWIN thought that the words "to be paid to the dean and his successors" are void, inasmuch as the bond is made only to the dean; wherefore, &c.

A man having two sons, the eldest is attainted, and dies without issue in the life of his father, the younger shall inherit the land: but if the eldest had issue left, the land should have escheated.

3. Co. 10. b. Plow.
557. b. Fit. Descend,
15. 17. 6. 64. Bar.
315. 11. 13. H. 4.
11. a. 7. a. 9. H. 5. 9.
2. E. 4. 3. 26. Aff. 2.
Br. Descend, 44. Es-
cheat, 8. 26. H. 6.
43. b. 13. H. 4. 8. a.
49. E. 3. 12. b. 49. Aff. 4. 7. Co. 13. b. Hob. 334. See Dy. 274. a. Dr. and Stu. 12. a. 16.
Note. 3. Co. 41. Stamf. Prerog. 195. Jo. 34.

(16) A MAN had issue two sons, and the elder, in the life-time of his father, was attainted of felony, and died, living the father; and afterwards the father died seised of lands in fee; Whether the land should escheat or not? was the question. And it was holden by BROWN, CONINGESBY, MOLINEUX, and HALES, that the land shall enure to the younger son as heir to his father, if the elder have no issue alive; but if he have issue living (because he is inheritable by the law, if it were not for the attainer), the land shall escheat to the lord, and not go to the younger son: which note, for the diversity of the law.

(16) At the parliament of 1. H. 4. numb. 132. there was a petition of the commons that the attainder of the eldest son in the life of his father should not be a bar to the younger, and the answer was, *Curra communis lex*. Ex lib. Mri. Hackwell,

Michaelmas Term,

32. Hen. 8.

(17) **T**OWNSHEND, *Serjeant*, put this case: If a man have to him, and his heirs, the nomination of the clerk of a church to an abbot, and the abbot ought to present over the clerk nominated to the ordinary; and then the king have the possessions of the abbacy, and he present his clerk to the said church, being void, without any nomination; and he who has the nomination is then at his writ. And the opinion of the Court was, that he may well have *quare impedit* against the incumbent only, without any one's being named as patron, for the king cannot be sued as a disturber: yet it was said by TOWNSHEND, that the king cannot be the instrument of any one; but SHELLEY said, that he was every man's instrument, for by him every subject has justice administered, &c.

Moor. 894. 864. 3. H. 7. 7. b. 35. H. 6. 61. a. 7. Co. 26. b. 4. E. 6. Journeys Abcompts, 13. 47. E. 3. 11. a. 28. E. 3. 47. Qua. Imp. 16. 22. H. 6. 26. b. 12. H. 8. 12. b. Qua. Imp. 149. B. N. C. 410. 4. H. 7. 15. b. Hob. 31. b. [Watf. Clerg. Law. 85. and Hughes Parl. Law. 76, 77. Dodder. Comp. Par. Lect, 12. fol. 68, 69.]

(17) *M.* 34. *Eliz.* A. administratrix [was to nominate], and the abbot to present; the abbey came to the king: A. ought to nominate her clerk to the king; by *Windbam* and *Walsley*.

E. 5. *Eliz.* If a stranger present, he who has the nomination, and he who has the presentation, shall join in *quare impedit*; the Book says, each of them shall have a *quare impedit*.

T. 9. *E.* 1. *Rot.* 17. Before the lord the king it is said, that the lord the king owes justice to the said Alan, and to every subject of the kingdom of *England*.

(19) **N**OTE it for law, That if the plaintiff labour a juror to appear and give a verdict according to his conscience, although the juror were never summoned to appear by the sheriff or his officers, yet that is not illegal labours him, or cause of challenge to the juror as specially laboured; *per tot' Cur'*.

Labouring a juror who was not summoned, to appear and give a verdict according to his conscience, is no cause of challenge.

14. 20. H. 7. 30. 11. Co. Litt. 157. b. Hob. 294. [Sed vide Co. Lit. 369. a.]

(19) *T.* 14. *Jac.* & Star-chamber, *Bradshaw*, plaintiff, *Salmon*, *Holt*, *Aynsworth*, and others, defendants; in that case *Baret*, one of the defendants, being sworn to give evidence, by persuation of *Salmon* withdrew, and did not give his evidence; whereupon *Salmon* and *Baret* both were now fined, s. *Salmon* in two hundred pounds, and *Baret* in one hundred and eighty pounds.

• Easter Term,

33. Hen. 8.

Villanage regardant being in issue, villanage in gross cannot be given in evidence.

10. 13. E. 4. 17. 2. b. and 4. b. Dyer, 258. 284. a. Yelv. 149. Moor. 359. [Cowp. 668. 766. 1. Hen. Bl. 162, 163. note, and 283. 4. Term Rep. 217. 1. Term Rep. 237. 239, 240. 659. 3. Term Rep. 643.]

(1) **I**N evidence upon an issue joined upon villanage regardant to a manor, it was holden by the Judges, that he ought to make his title to the villein as regardant, as the issue is joined, and not whether he be villein in gross or not, that is not the charge of the jury. But BROMLEY thought the contrary, inasmuch as their charge is upon the right of the villanage, *i. e.* whether he be villein or not.

A man having a manor with a villein regardant, makes a feoffment of one acre by the words, "*I have given one acre,*" &c. and besides, I have given I. S. my villein," he passes as in gross.

Co. Litt. 333. b. 13. H. 4. Grants, 88. Dier, 351. a. Godb. 127. Bridg. 32. Godb. 129. 4. H. 7. 10. a. 33. H. 6. 5. a. 43. E. 3. 25. b. 6. E. 3. 56. Garraty, 61. 5. E. 3. 66. Liberty, 7. Perk. 122. b. 1. 17. E. 3. 18. a. 4. 36. Aff. 3. 9. H. 6. 28. Fit. Feoffment, 77. 48. E. 3. 4. b. [Watf. Cler. Law, 61, 62.]

(2) **A**LSO it was moved, That if a man have a manor to which a villein is regardant, and make a feoffment of one acre of the manor by these words, "*I have given one acre,*" &c. and further I have given and granted John S. my villein;" Whether the villein passes as villein in gross, or as appendant to that acre? And some thought that he should pass in gross, because they are several gifts; though they are in one and the same deed. (3) And therefore SHELLEY thought, that if a man have a manor to which an advowson is appendant, and make a feoffment of one acre, and in the same deed afterwards grant the advowson, this is in gross; otherwise it would be, if the feoffment were made of the entire manor; but BROMLEY doubted of the law in the former case.

If a tenant in tail of a manor with villeins regardant enfeoff one of them of one acre parcel, &c. the issue cannot seize his villein till the acre be recovered.

9. E. 4. 39. a. 12. E. 4. 2. Dy 5. a. Fit. Descent, 26. 33. H. 6. Litt. 138. a. b. and

(4) **A**LSO it was moved, If a tenant in tail of a manor to which villeins are regardant enfeoff one of the villeins of one acre parcel of the manor, and die; although the manor descend to the issue in tail, yet cannot he seize his villein till the acre be recovered: and this by the opinion of the Judges. *Tamen quare inde.*

13. a. 14. H. 7. 5. A. discout. 16. 5. H. 7. 27. b. 23. Aff. 8. [See Co. 349. b.]

Earl of Bridgewater's Case.

(5) **MEM.** That the Earl of *Bridgewater* had an estate tail in the land of one *Basset*, to whom was remainder in tail for defect of issue, &c. And before the statute made, whereby tenant in tail may make a lease for twenty-one years, or three lives [32. H. 8. c. 28.], the earl was bound in a recognizance to *Basset*, that he would not aliene, sell, grant, transfer, or exchange the land, save for the term of his own life: and it was moved, Whether he might make a lease for twenty-one years without forfeiture of the penalty? (6) And holden by *BROMLEY*, *PORTMAN*, and *HARRIS*, *Serjeants*, that he cannot make it without forfeiting the bond, although the statute, to which every one is a party, was made since the recognizance: but if he make a lease for twenty-one years, or * three lives, they thought that he in remainder cannot avoid the lease after the death of tenant in tail without issue, nor can the donor. And so shall the statute be expounded, for this was the intent and meaning of the makers, and yet no mention is made in the statute of the donors, or of those in remainder.

Tenant in tail bound before the 32. H. 8. c. 28. not to make over his estate for a longer term than his own life; if, after the statute, he make a lease under it, the penalty is forfeited, but the remainder man, or reversioner, shall not avoid the lease.

8. Co. 34. a. *Noy*, 242. R. 631.

28. H. 8. 27. b. 52. a.

28. b. 11. Co. 76. b.

19. H. 6. 24. 4. H. 7.

11. 19. H. 6. 64. 7.

8. Co. 86. 24. a. *Dy.*

107. b. *Plow.* 560. a.

7. *Ells.* 240. a. *Co.*

Litt. 223. b. *B. N. C.*

37. a.

[3. *Bac. Ab.* 317.]

* [49. a.]

Moor. 590. *Dy.* 52.

(5) *M.* 18. *E.* 1. *Rot.* 33. ♦ *Richard Vernon Knight* by his writing was bound to our lady the queen, consort of the king, in two thousand pounds, that he should not aliene or sell any of his lands from his first-born son and his heirs. *Ex lib. M. 11. NOV.*

M. 4. *Jac. C. B.* in replevin by *Sir Fulk Greville v. Stapleton*, tenant in tail with restraint from making a lease *nisi sub modo* by private † statute, 27. *El.* 8. not extended by statute 32. [H. 8. c. 28.] adjudged. [*Noy*, 141.]

† *Orig. nature.*

(6) *M.* 1. *E.* 6. [Bro. Acceptance, 19.] By all the Judges, a lease for years by tenant in tail, if he die without issue, shall not bind him in remainder. So adjudged *Hil.* 40. *Elm.* in *C. B.* but entered 39. *Elm. C. B. Rot.* 941. in *Reve v. Cox* [*Noy*, 66.] in the case of a lease for three lives, made by tenant in tail, which does not bind those in remainder.

4. *Mary.* *PER CUR.* A lease is void against him in remainder or reversion.

Lyte et Ux' against Peny.

(7) **T**HE case between *Lyte* and his wife and *Gyles Peny* was argued by the Judges of the Bench; and in effect it was as follows:—A man bailed a certain sum of money to another *to the use and behoof of a woman*, and to deliver it to her on the day of her marriage. And before the marriage the bailor countermands and revokes the said money. And, Whether he can do this? is the matter in law.

If a man bail money to another to the use of a third, and to be delivered on the day of marriage, he may countermand it at any time before delivery over.

[*Cary. Rep.* 9.]

1. *E.* 5. 2. a.

39. *H. 6.* 7. b.

And

And JENNEY and WILLOUGHBY argued it; (*sed non adfuit*) and they thought that he could not countermand it, &c. (8) But BALDWIN and SHELLEY *à contra*. And SHELLEY said, that in every gift for the common ground, there should be three things, *s.* a donor, a donee, and a thing to be given; and if any one fail, the gift is imperfect; and he would add to this the saying of BRACTON *de acquirendo rerum dominio*, [Lib. 2. c. 5. fol. 11. b.] *s.* that gifts though commenced, are of no force if they be not completed. And in this case the gift was not completed for two reasons; one, because it may happen that the woman, who was the third person, may disagree to this gift, and then the gift is imperfect; for she is not compellable to take against her will. (9) Also in case the woman die before her marriage, or enter into religion, and become professed, or choose never to marry, then again she can never have the money. And this BALDWIN afterwards allowed. For when a man makes such sort of conditional gift of his mere will and good pleasure, and delivers the things into indifferent hands to keep for the use of a stranger, still before the condition is performed the bailment is revocable. (10) For if a man deliver to his servant, on new year's day, a golden cup, to give as a new year's gift to a stranger, clearly he may countermand this, notwithstanding the gift, for this was not a gift perfectly executed. And there is a difference, when a man makes a gift or bailment to give to a stranger upon a consideration or former duty. As if I say that *I. S.* has enfeoffed me of certain land, and, in recompence thereof, I give him this money, and bail it to a stranger to give it over, I cannot countermand it, because this gift does not take effect as a pure gift, but as a satisfaction. (11) And the law is the same when a thing is delivered in consideration, satisfaction, or recompence of another thing, there he cannot countermand. And so here, if the case had been that the bailor had * been to

Perk. 1. 27. H. 8. 27.
31. Co. 73. Plow. 562.
39-

Dy. 59. b. 9. H. 6.
58. 39. H. 6. 44. b.
9. E. 4. 46. a.

Fisch. 9. a.

1. H. 5. 11. a.

[1. Str. 165.]
18. E. 4. 18. b. 2. 13.
H. 4. 12. 1. 41. E. 3.
10. a.

* [49. b.]

(10) M. 4. *Jac. & Turberville* plaintiff in the Exchequer against *Porter*, in an action of account; the defendant pleaded, that the plaintiff, being in debt to the *Earl of Pembroke* in the same sum, gave him the sum to pay, and that on such a day he paid it. Plaintiff replied, that before the day he countermanded; the defendant demurred thereto. And the opinion of the Barons was, that he might countermand it, for he might himself have paid it since.

(11) M. 31. & 32, *Elix. Clarke v. Archdale*, [2. Leon. 30. 89.] in the Exchequer, it was adjudged, that if I owe to *A.* one hundred pounds, and deliver to *B.* divers goods in satisfaction of the one hundred pounds, the property is immediately altered, and *B.* may sell the goods. *as between the immediate parties — provided A. cannot be authorized B. to accept the goods.* 2. be

be bound by covenant in consideration of a marriage precedent to pay such a sum, then could he never revoke it; for this alters the property immediately; but it is otherwise of a mere gift without any cause precedent. (12) And he said, besides, that in the eighteenth year of the now king, a man made a feoffment to perform his last will, and his will was annexed to the charter of feoffment, and livery of seisin thereupon made accordingly; and it was adjudged, that he may alter and revoke this will, although it took effect upon the livery, &c. (13) BALDWIN, to the same purpose; for here there was no gift executed, but only executory, and therefore he may revoke it; as if a man make a letter of attorney to make livery of seisin, he may revoke it at his pleasure: and also it appears expressly, that it was agreed between them at the time of bailment, that whenever the bailor re-delivered to the bailee a bill sealed, witnessing the said receipt, that he should then have back the money; this expresses the intention of the bailor, that such gift should be revocable at his pleasure. (14) And further, he saw no difference between this and the common case, unless on account of those words "*to the use and behoof*;" for none can deny, but that if a man bail a thing, to bail it over to a stranger, the bailor may at his pleasure countermand it before the bailing over. And this would be the same case here, if those words "*to the use and behoof*" were omitted. (15) And he thought that those words did not alter the case, for the property of money cannot be changed by words of use and behoof: and this is proved by the statute made 50. Ed. 3. c. 6. of fraudulent gifts made of goods and chattels to defraud creditors; the law before was, that a gift of goods to the donor's use should not be good, but the property was immediately in the donee; and this word "*use*" is void, or otherwise the statute had been made in vain; for if the property had remained always in the donor, then the creditor might have execution of them, although that statute had never been made. Wherefore, &c.

Cro. 120. b. 6. Co. 68. 8. Co. 82. a. 19. H. 8. 11. a. 5. E. 4. 8. a. 20. H. 7. 11. a. 14. Eliz. 314. b. Hob. 349. Litt. Rep. 25. 5. Co. 90. [2. Br. Caf. in Ch. 544.]

[So of a licence, 4. Term Rep. 78.]

34. H. 6. 14. a. 8. E. 4. 12. a. Perk. 480, 481. 160.

19. H. 6. 35. a. 20. H. 6. 35. a. 1. H. 7. 10. b. Raft. Tit. Execution, 5. Dyer, 295. 192. 22. a.

2. E. 4. 2. a. B. N. C. 288. 334.

[2. Vern. 203.]

8. Co. 95. b.

[Cowp. 294. 565. 664. 4. Burr. 2237.]

(15) A man gives chattels by deed, and delivers the deed to the use of the donee, the goods and chattels are in the donee immediately before notice or agreement. 3. Co. 26. b. *Baker's* and *Baker's* Case.

 Earl of Southampton's Case.

Whether by the statute 27. H. 8. c. 27. establishing the court of augmentations, the grant of the office of steward in that court be good, if sealed only with the great seal?

[See Termes de la Ley, 68].

7. Eliz. 23a. b. 11.
Co. 57. b. 2. Keble, 643.

32. H. 6. 22. a. 4.
Mar. 135. b.

21. Co. 64. b. 63. 59.
Rast. Court, 2.

20. E. 4. 7. a.

5. Car. Cro. 171. 501.

Cro. 90. Hob. 173.
Mo. 658. 43. Alf. 23.

Dy. 19.

38. H. 6 18. a. Plow.
113. b. 206. 155. b.

Hob. 173.

[Cowp. 297. 4. Term
Rep. 109. Com. Dig.
Parliament, (R. 9. 10.)
a. Hawk. P. C. 9. 18.]

(1) **NOTE**, That the honor of *Petworth* in *Suffex*, by act of parliament, is within the ordering and survey of the court of augmentations; and the king, by bill, assigned and granted the office of steward, and divers other offices of the said honor, to the Earl of *Southampton* for life; which bill passed the great seal in chancery. And whether this grant under this seal was good or not, was much doubted, inasmuch as there is one clause in the act of establishment of the court of augmentations, made 27. H. 8. [c. 27.] (2) "That all grants and letters patent to be made for term of life or years of any office concerning the lands of that court, shall be made and written by the clerk of that court, and sealed with the great seal of that court; and that such grants shall be good against the king, &c." without any words of restraint, i. "and not by any other clerk." (3) And many of the Serjeants thought, that the most secure way would be to have it under the seal of the augmentations, because this word "shall" is obligatory, and in some sort compulsory; but some thought the grant under the seal of the chancery good enough in law. For *BROMLEY* said, "that if it be enacted by parliament, that the youngest son shall have appeal of the death of his father, that shall not exclude the eldest from his suit, because there are no words of restraint." See a similar case, 3. & 4. P. & M. fol. 135. b.

(2) But by a clause in the statute, it sufficiently appears, that a grant under the great seal is good, for in the act there is a proviso that tenure *in capite* shall be reserved in all grants of any inheritance made by the great seal. Pulton Stat. 618. b.

Saccombe's Case.

(4) **I**N *B. R.* was this case:—A woman had poisoned her husband in *Devonshire*, which offence is made treason about the 31st of *Hen. 8.* [22. *H. 8.* c. 9.]; and by the general pardon granted by parliament in the 32. *H. 8.* [c. 49.] this offence was pardoned. Now the son had brought appeal of murder against the wife; the question was, Whether this appeal lies? And some thought, that because the offence is made treason, it mergeth each lesser crime, as the crime of murder, which was before at common law, and so the offence is not punishable as murder but as treason, and so no appeal lies. (5) But some were of a contrary opinion, inasmuch as the first offence is not tolled by the augmentation of the punishment of it, but always remains; as to hunt in parks is now made felony, yet the offence may be made trespass at the pleasure of the party, &c. But * the opinion of the Judges was (*ut audiui*), that the appeal was not maintainable. See *T. 3. H. 7.* [10. a.] a similar matter, and *M. 7. Eliz.* fol. [235. a. post.].

(4) The reason as it seems to me is not because the treason extinguishes the murder, for I understand that the king, at his election, may indict him for murder or treason; but the reason is, inasmuch as the life of man would be twice put in jeopardy; and the king being entitled by matter of an higher nature, his remedy shall not be obstructed by the suit of the party. 2. *R. 3. 10. b. sub fin'* One was indicted for misprision of felony, where it appeared that the offence was felony, and well, because felony includes misprision. *Stamf. 37.* [1. *H. H. P. C.* 652. 708.]

A wife killed her husband, the king pardoned all treasons, the son's appeal is gone. *Stamf. 59. d.*

Where poisoning was made treason, and afterwards a general pardon passed, no appeal of murder lies.

Stamf. 10. a. 59. 1. R. 3. 4. a. repealed by 1. *E. 6. c. 12.* and 1. *Mar. c. 7.*

18. *E. 4. 2. a. Stry. 347.*
3. *Inst. 20. 6. Co. 13. b. 2. H. 7. 10. b. 31. H. 6. 15. b. Dyer, 69.*

*Pulton, 162. a. Finch. 69. fol. 6. 14. H. 7. 10. b. 46. 47. E. 3. 12. 10. b. * [50. b.]*
[*Fost. Cr. Law, 324, 325. 1. Hawk. 133. note (3)*]

(6) **T**HE case in *B. R.* was this:—A man was condemned in debt by a verdict passed at *nisi prius*; and he paid part of the debt to the plaintiff, who gave an acquittance of the sum received in these words, "Received ten pounds in part of payment of a more sum, wherein + the defendant was condemned by judgment given by the Justices of assize in Derbyshire," where in truth the judgment was given in *banc* (*ut oportet*). And it was moved, Whether this acquittance on account of this misrecital was sufficient in law to found an *audita querela*, because the plaintiff had sued out a *capias ad satisfaciendum*? And it seemed not, for no such judgment was given. (7) For if I release all actions which I have by reason of a will, and I am not executor, that re-

An acquittance in these words, "Received ten pounds, in part of payment of a more sum, wherein defendant was condemned by a judgment given by the Justices of nisi prius," is not a good release to found an *audita querela*, should the plaintiff sue out execution upon the judgment for the whole, for it is not true, judgment being given in *banc*.

[*Plow. 392, 393.*]
3. 15. *H. 7. 3. b. 10. 19. H. 6. 12. 5. H. 7. 41. a. cont.*

† Orig. *I am.*

14. E. 4. 2. a. 48. E.
3. 18. a. 8. H. 6. 39. a.
2. Co. 33. a. Plow. 161. a.
14. H. 8. 8. b. 9. Plow.
355. 2. 7. E. 6. 87. a.
2. E. 4. 27. b. Plow.
191. b. 7. E. 6. 80. b.
20. Aff. 8. 3. Co. 10. a.
10. 113. a. Plow. 170.
169. 8. Co. 154. b.
1. H. 7. 14. b. Dyer,
376. b. Br. Releases, 49.
[Carter, 150. 1. Term
Rep. 704. Shep. Touch.
245, 246, 247. 75.
Bac. Ab. Release, L.]

lease is void to all intents; and so if I release *all the right which I have in all the lands which I. S. hath by descent*, and he hath nothing *by descent*, the release is void, because it is uncertain, and named in generalty. (8) But HORWOOD, *Attorney General*, said, that if I release *all the right which I have in Whiteacre*, and name the land in certain *which I bought of such a one*, and in truth *I bought it of another*, yet because the land is certainly named first, the release is good notwithstanding a misrecital afterwards, but when it is made general it is otherwise. And so there is a diversity. See *accordant, M. 2. E. 4.* [29. b. pl. 36.]

Warneford's Case.

In appeal of murder, the writ being to "*contra A. B. ubi dicitur*" "*A. C. brother and heir of the deceased*," is bad. The addition should be to the name and not to the *alias dictus*.

B. N. C. 49.
30. H. 6. 5. a. 6. H. 7.
10. a. 1. And. 36.
Winch. 27. Dyer, 40.
b. 46. a. 113. b. 214.
a. 119. b. 1. E. 4.
1. a. Long 510. E. 4.
141.

(9) WARNEFORD of the *Temple* was sued upon an appeal of murder brought in the county of *Wilts*; and the writ was, "*To answer A. B. alias dict' A. C. brother and heir to him who was murdered.*" And it also appeared upon the count, that the stroke was given in the county of *Wilts*, and that he languished three weeks in *D.* in the county of *Bucks*, and there died, *and so the aforesaid defendant, on the day and year aforesaid, at C. aforesaid, feloniously did kill and murder.* (10) And upon this appeal the defendant was discharged, for the plaintiff is not named *brother and heir* in the substance of the writ, but only in the *alias dict'* *brother and heir*; for his very name, and the name by which he ought to bring the writ, should have been put before the *alias dict'*, as to answer *A. B. brother and heir, &c. alias dict', &c.* And also it was moved, that the conclusion of the count is repugnant to the premises, for he was not murdered on the day on which he was stricken; for he lived after that three weeks. Therefore *quære inde bene*; for the

[2. Hale, 187. 188.]
[1. Hawk. 263. 325.]

(10) Adjudged often in the time of WRAY, *Chief Justice of England*, that he shall be supposed to have been killed where the death was; and for this reason three or four judgments were reversed: and that was also alleged for error in the writ of error brought by an executor of a man attainted of felony against the bishop of *London*, and these judgments were cited at the bar, and affirmed by the bench: but POPHAM, then *Chief Justice*, said, that he had the same case in his practice about 32. *Eliz.* upon a matter in *Wales*, when he was *Attorney General*, and that he asked the opinions of the two *Chief Justices* and *Chief Baron*, and they answered him, that the indictment was good; that he killed where the blow was; notwithstanding WRAY then cited divers judgments in late times. And POPHAM said, that he had searched divers precedents, and the greater part supposed the killing where the blow was given. And therefore they held clearly, that either way was good, and therefore no error. H. 26. *El.* in *B. R.* [Cro. *Eliz.* 739.]

Judges and Serjeants were in doubt upon this point. But for the first cause, the defendant was * discharged: See for the first point, 36. H. 6. [28. b.] In debt, where in the *alias diſcus* the defendant was named of *London*, and not in the first part of the writ, wherefore the writ was abated. And also, T. 30. H. 6. [5. pl.] 2.

Plow. 262. a. 4. Co. 42. a. 47. a. 4. E. 4. 10. a. Dyer, 173. b. Br Brief, 418. [2. H. H. P. C. 177. a Hawk. P. C. 328, 329. Leach's Caf. Cf. L. 355.]

Waberley against Cockerel.

(12) [*N B. R.* the case was as follows: One *Edmond Cockerel* and one *Henry Huttoſt* were jointly bound in a single bill to one *John Waberley* of *London*, and *Huttoſt* died; and *Waberley* brought an action of debt in *London* against the other alone, and declared upon this bill; and the defendant pleaded, that he ought not to be charged for the said bill, "because as to part of the money, *Huttoſt* paid the plaintiff at such a ward in *London*, and the residue he himself paid to the plaintiff at the same place at another time, which the plaintiff received in full satisfaction, &c." and delivered the said bill obligatory in the name of an acquittance of that debt to the said defendant, by reason of which the said bill hath totally lost its force and effect; and afterwards the plaintiff took from him by force and arms the said bill; and so the said defendant saith, that the said bill is *not bis deed*; and of this he puts himself upon the "country, &c." And to this plea the plaintiff demurred in law. (13) And now it was argued by *STAMFORD* and *BROMELEY, Serjeants*, for the plaintiff, that the plea was bad for several causes; as well because when a man pleads payment in the same county where the action is brought, the defendant shall rely upon the *debet, &c.* as also because he hath not shewn acquittance of the payment; for the maxim in law is, that a single bill cannot be avoided and answered by naked matter, but it must be by matter of as high a nature as the obligation is, i. by matter in writing. (14) And therefore in 4. H. 6. [17. b. & 5. a.] it was adjudged, that an award was not a bar in debt on bond; and in 11. H. 4. [79. b.] a man was condemned in arrearages before auditors assigned; and in debt brought for the arrearages, he pleaded that he made the bond to the plaintiff for the same debt; and

To an action upon a bond, it is no plea, that it was re-delivered in the name of an acquittance to defendant, *ſo non eſt factum*; re-delivery is no acquittance.

9. E. 4. 24. b. 12. H. 7. 3. a. Palm. 287.

5. Co. 117.

5. E. 4. 4. b.

1. H. 7. 14. b. 9. H. 6. 37. b. 22. 37. H. 6. 52. 14. 43. E. 3. 24. a. 5. H. 4. 2. a. 5. H. 7. 13. b.

Ante, 25. b. 9. E. 4. 53. a. 43. Aff. 18. 20. 22. 28. 33. 37. H. 6. 16. a. 13. b. 6. a. 3. b. 10. b. 26. H. 8. 25. b. 1. H. 7. 16. a. 1. H. 5. 7. a. Dyer, 6. a. 12. H. 7. 33. b. 41. a. 4. a. 15. E. 4. 5. b.

[Cro. Jac. 177. Cro. Elia. 455. 5. Com. Dig. 255.]

Br. Arbitrament, 25.

28. H. 8. 21. b. 6. Co. 44. a. 3. H. 6. 53. a.

18. 27. H. 8. 3. a. 22. a.

22. E. 4. 51. a. 1. 37. H.

6. 19. a. 5. H. 7.

33. b. 46. E. 3. 6. b.

6. E. 3. 44. a. 18. H.

6. 17. a.

17. E. 3. 24. a. 1. H.

6. 4. Perk. fol. 32.

* [51. b.]

[13. Vin. Ab. 90. pl. 9.
in notes, and 91.]

[Shep. Touch. 58.]

it was holden no plea, because the first debt was not changed by the bond. (15) And in account upon receipt by indenture, the defendant shall not plead against it *unques son receiver, &c.* And in a writ of annuity, payment is (a) plea, if it be granted out of the land, otherwise not. And although the truth be, that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law: (16) for if matter in writing may be so easily defeated, and avoided by such * surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact; and besides this bill cannot be an acquittance, because it is not made in the name of the obligee, nor are there any words of acquittance: besides it cannot be the deed of the obligee, for a deed that was once good, can never have two deliveries, for the second delivery is utterly void to make it the deed of the party.

(a) See 1. Vin. Ab. 195. plea 10. that the word *no* is here omitted by mistake, but it is so in every edition.

Tenant in tail before the statute of Uses made a feoffment to the use of himself and his heirs, and then a lease, reserving rent, and after the statute died; this lease shall not be avoided by a grantee of the issue who aliened without entering.

34. H. 8. Br. Remitter, 49. cont. Dyer,

(17). **TENANT** in tail before the statute of Uses [27.

H. 8. c. 10.] made a feoffment in fee to the use of himself and his heirs, and afterwards he and his feoffees made a lease for years, rendering rent; and after the statute passed, the tenant in tail died seised, and his issue aliened the land by fine before any entry made upon the termor, or any receipt of the rent, and the alienee accepted the rent: *Quere*, If after this he can avoid the lease? And as it seemed by the

(17) *M. 41. & 42. Eliz. C. B. Green v. Wyntman*, [Noy, 73. Owen, 86.] that *cestuy que use* hath such seisin before his actual entry, that upon it he may maintain assize.

M. 41. & 42. Eliz. A. lessee for life, remainder to B. in tail; B. leased to C. for years, to commence after the death of A.—B. afterwards suffered a common recovery to D. and died; the lease for years is good against D.

By NOY, in his lecture, it was said to be adjudged, *M. 6. & 3. Eliz. A woman tenant in tail acknowledged a statute, and took husband, had issue, and died; the lands may be extended in the hands of the tenant by the curtesy, and in the hands of the issue in tail (if the tenant by curtesy surrender) during the life of the tenant by curtesy. And it seemed to him, that if the tenant in tail had made a lease for years, rendering rent, it should not be extended on the statute after the death of the consor in the hands of the lessee, because the issue shall lose the rent, but otherwise if no rent were reserved.*

If tenant in tail make a lease for forty years to commence ten years afterwards, and die, and the issue, within the ten years, enter, and make a feoffment; the feoffee, at the end of the ten years, hath his election either to make this lease good, or to avoid it. [Co. Litt. 46. b. last Edit. and note 2. there. Sed vide Salk. 338. Carth. 260.] Plowd. fol. 437. a. Difference was over-ruled in *Bridgman's Case*, *M. 13. Jac.* [1. Rol. Rep. 260.] 23
COVENTRY said.

better

better opinion of the Judges of both Benches, except SAUNDERS, the alienee shall never avoid it, whether he receive the rent or not; for the lease was not merely void by the death of tenant in tail without actual entry made by the issue; otherwise it would be of a rent granted: as in the case in Littleton [§. 660. Co. Litt. 349. a.] of the feoffment of tenant in tail to his eldest son within age; and when he came of full age, he made a lease for years, and then the father died, so that the son is remitted; still shall he not avoid his lease as he shall the grant, by BROMELEY.—Note the diversity.

23. b. 54. a. 77. b. 129. 191. 3. Leon. 154. Bridg. 27. 7. Co. 9. a. 1. Co. 48. b. 1. Rol. Rep. 403. Dyer, 46. a. 252. b. 337. b. 7. 14. 43. Aff. 19. 3. 4. 5. 5. H. 7. 14. b. 44. E. 3. 26. a. Mo. 315. Bridg. Rep. 98. 7. Co. 14. a. 2. Bulst. 44. Lit. 147. b. [4. Mod. 5. 3. Bac. Ab. 311, 312. Dougl. 50. Cowp. 482. 1. Term Rep. 86. Co. Lit. 215. a.]

(18) **N**OTE this diversity for law by SHELLEY: If a man make a lease for a term of years rendering rent, and if the rent be in arrear for the space of one month next after the day of payment, that the term shall cease; if the rent be arrear for the said space, the lessor cannot enter into the land without demanding the rent *upon the land*, for there the rent is payable of right; but if the rent in this case be reserved payable at another place *out of the land*, then the lessor may enter without making demand *upon the land*, because it is not payable there. See more concerning it, H. 4. & 5. Ed. 6. post. fol. [68. a. b.]

Condition, that for default of rent paid, a term shall cease; it is necessary to make a demand of the rent upon the land; *scilicet*, if it be reserved payable off the land.

11. H. 7. 17. a. 3. Mar. 127. b. 20. H. 6. 30. a. 47. E. 3. 12. b. Dyer, 222. a. 4. Co. 73. a. Plow. 71. a. [Co. Lit. 201. b. 202. a. 144. a. 2. Mod. 264. Dougl. 486. Crq. Jac. 145.]

(18) E. 43. Eliz. B. R. & Nevill v. Keyworth, by GAWDY. It is not requisite to make any demand when the payment is to be made at a place out of the land: *contra*, by POPHAM.

* Hilary Term,

33. Hen. 8.

* [52. a.]

(20) **T**HERE are two coparceners, and one of them made a lease for a term of years of that part which belonged to her; and then the other brought a writ of partition against the lessor; and partition was made. In this case, *quære*, if the part allotted to the lessor be less than the part of the other, What remedy for the termor? And some thought that there is no remedy for him, but he must remain contented with that which his lessor hath. But if the partition had not been by writ, then *quære*.

If a parcener have leased her share, and upon a writ of partition if too little be allotted to her, the lessee hath no remedy; *scilicet*, perhaps, on partition without writ.

21. E. 3. 57. N.B. 62. G. 1. Inst. 46. a. cant. 34. Aff. 15. 26. H. 8. 2. b. 5. Co. 116. a. Plow. Quere 12. a. 21. b. [1. Bac. Ab. 449.]

The king cannot dispense with future acts of parliament; though he may with things in future whereof he hath the inheritance.

3. Bulst. 5. 11. Co. 36. a.
4. Co. 35. b. 2. Keb. 426.
1. a. 11. H. 7. 3. a.
6. b. 12. a. 3. Keb. 144.
Rast. Tit. Brasse, a.

[Bac. Ab. Prærogative (D 7.).]

31. Co. 86. Ro. 153.
1. Sid. 6. 1. Rol. Ab.
198. Dyer, 48. b. 54.
56. 7. Co. 36. b. a.
R. 3. 12. a. Plo. 32. a.
59. a. 331. b. 2. Keb.
783. F. Grant; 9. Dier,
108. a. 19. 20. H. 6.
62. 12. b. 21. E. 4.
44. b. 6. H. 7. 5. a.
38. H. 6. 10. b. 2. R. 3. 4. a.

(1) THE king had granted to one a licence to export bell metal out of the kingdom, *nonobstant* the statutes then made and thereafter to be made; and after the licence, s. at this last sessions of parliament [33. H. 8. c. 7.], it was enacted, that no person should export bell metal, &c. after the first day of April last under a certain penalty: Whether the licence by this act was revoked? was a question asked of the Judges of the Bench. (2) And it seemed to BALDWIN and SHELLEY that it was, for he is a party to the act; and the king cannot dispense with a new law to be made by act of parliament before that the act be made (a), as he may in things in future of which he hath the inheritance; as if he grant to one to be discharged of all taxes and subsidies to be granted, that is good. *Quære. Simile, M. 34. fol. 54. [a. pl. 17. post.]*

Dev. 14. b. [4. Bac. Ab. 205. Cowp. 108.]

(1) GLANVIL of *Lincoln's Inn*, in his readings *Lent* 1629, said, that he had seen a patent granted to one, that he should not be compelled to be a serjeant, or a judge, or a knight. And he took this difference: such things which belong to the king to make, as to be a judge or a knight, the king may dispense with; but of such things as are in the election of the people, although the king sends the writ to the sheriff or coroner to elect a knight of the shire or burges, he cannot dispense with it. [a. Hawk. P. C. 551, 552.]

(a) By 1. W. & M. sess. 2. c. 2, § 12, it is enacted, That from and after that session of parliament, no dispensation by *non obstante* of or to any statute or any part thereof

shall be allowed, but that the same shall be held void, and of no effect, except a dispensation be allowed of in such statute, &c.

* [52. b.]

If tenant by knight-service make a gift in tail reserving rent, the donee shall hold by knight-service and the rent.

2. E. 4. 5. b. Perk.
637. 650. 3. Aff. 9.
49. E. 3. 10. a. Dy.
19. b. 147. a. 6. Co.
7. a. Cro. 123. a. 4.
Co. 80. Lit. 291. 26.
Aff. 66.
3. Aff. 8. 19. E. 2. F.
Avowry, 224. 49. E. 3.
30. a. Post. 299. 33.

(3) A MAN held by knight-service, and at this day made a gift in tail reserving to him and his heirs ten shillings, without other words: Whether the donee shall hold of the donor by knight-service and ten shillings? was moved by BROMELEY. And SHELLEY thought * that he should hold by both, for one of them the law hath reserved, s. the tenure by knight-service, without any words; and the ten shillings is added to that by the special reservation of the party (a). *Quære* the law; because BROMELEY and others were of the same opinion, *tamen quære*. See † T. 6. M. fol.

(a) But if the reservation had been of fealty and rent, the donee should have held the land in socage by fealty and rent, and not by knight-service, for the special reservation excludes the tenure which the law

would have created. Co. Lit. 23. a. But by 12. Car. 2. c. 24. all sorts of tenure, except frank-almoign, grand serjeanty, and copyhold, are now turned into free and common socage,

Fitzwilliam's Case.

(4) **T**HE parson of a church made a lease of his rectory for a term of forty years; and the patron and ordinary made a confirmation of the grant, and lease, for the term of twenty years immediately ensuing the commencement of the term, by these words: "and we *Stephen*, by "divine permission bishop of *Winchester*, ordinary of the "church of *S.* the granting and demising aforesaid, and also "the indenture annexed to this writing of confirmation, and "all things therein contained, for ourselves and our successors, as much as in us lies, to the aforesaid *J. S.* do "ratify, approve, and confirm by these presents; in witness "whereof, &c." (5) And this was annexed in a schedule to the indenture of lease. And the like confirmation the patron made in the first person, s. "and I, &c." And by the opinion of several, this confirmation is good for the entire term of forty years: but many held the contrary.—And this was the case of *Mr. Fitzwilliams* for the rectory of *Sheen* in *Surry*. See a similar case *T. 2. M. & fol.* and a good case of that *M. 16. Eliz. fol.* [338. b. 339. a. *post.*]

A lease made by the parson for forty years, is confirmed by the dean and ordinary for 20 years; Whether this be a good lease, or not? *25.*

Winch. 95. Roll. 58. a. 5. Co. 81. a.

31. E. 3. F. Garratt. 61. Litt. 119. b. Litt. 122.

[*2. Black. Com. 319. &c. 3. Bac. Ab. 384.*]

Trinity Term,

34. Hen. 8.

The King against Edward Muschamp.

[* 53. a.]

(6) **I**N the exchequer a jury appeared upon an issue joined in an information upon the statute 23. of the now king [32. H. 8. c. 9.] for maintenance and buying of pretended titles, where the issue was, that the defendant did not buy, &c. against the form of the statute. And it was given in evidence for the king by *MOLINEUX Serjeant*, and *HORWOOD Attorney-General*, and *BRADSHAW Solicitor*, that one *Muschamp* was seised of the land comprized in the information, and enfeoffed two men upon * condition to re-enfeoff him and his wife for life, remainder to one *William M.* his younger son, in tail, with divers remainders over (without shewing to what persons), and the estate was executed according-ly.

A man makes a feoffment to be re-enfeoffed to himself and his first wife, remainder to his fourth son in tail, remainder to his eldest son; and afterwards makes a new feoffment to be re-enfeoffed to himself and his second wife, remainder to his eldest son in tail, and then dies; the fourth son enters; Whether the eldest, under 32. H. 8. c. 9. may buy a pretended title to the estate?

Co. Lit. 369. a. b. Rast Maintenance, 7.

cordingly. And afterwards *Muschampt* the father made a new feoffment to the first feoffees, upon condition that they should re-enscuff him and his second wife for life, remainder to *Eaward*, another of his sons, in tail, &c. which said *Edward* was defendant in the information: and he procured the deeds of the first estate to be cancelled, because he was not the next immediately in remainder by them; but the fourth son is in the remainder by the first deed. (7) And after the death of the father, tenant for life, *William*, who was in the first remainder, entered and took the profits. And the said *Edward* bought the title of a man who was not in possession. And because the first deeds were cancelled, they shewed to the Court a copy which was the draught of it, and written by the defendant himself, by which it appeared on the face of it, that the said *Edward*, who was the defendant, was remainder man in default of issue of *William*.

3. Cro. 752. }
5. Co. 104. a. } *q. vid.*
Co. Lit. 72. a. }

(8) And the defendant offered to demur to this evidence; and the king's counsel refused it, because in giving their evidence they made no mention of the last remainder, but omitted it, although the writing they produced spoke of it. And upon this there was much contention whether they could waive that; but at length the Court charged the jury to enquire of the whole matter, and to find it, and upon such finding the Court would adjudge upon the law, *s. whether* he in the last remainder may buy a pretended title by the proviso which is contained in the statute, *s. that every person being in lawful possession by taking of the yearly farm, rents, or profits, may buy or obtain any pretended title, &c.* (9)

3. E. 4. 26. a. Plow.
85. a. 236. a. 322. a.
fol. 181. a.

And here when *William*, who was in the first remainder, entered after the death of his father for the forfeiture, he devested all the new remainders, and re-continued the ancient ones; and therefore it was said by the defendant's counsel that he had not offended against the statute, because he in remainder and the particular tenant make only one estate, and the seisin of one is the seisin of the other. But the king's counsel thought the contrary was clear: (10) For by the buying of the title of the particular tenant, he intended to defeat all the first remainders. And also the intendment of the statute, as appears by the words, ought to be * taken, that he who may buy a pretended title ought to be in possession *by the taking of the annual profits and rents*, which he in remainder in this case is not. *Ideo quare.*

9. 14. E. 3. 28. 17. 9.
16. 36. Aff. 20. 16 4.
41. Aff. 1. Plow. 88.

Dyer, 191.

Bro. Remitter, 4. Lit.
150. b. 39. 50. E.
30. 21 43. Aff. 45.

* [53. b.]

[1. Hawk. Pl. C. 557.]

Co. Lit. 369. b. Plow.
331.

Rolfe, Widow, *against* Hampden, Knight.

(11) **A**TTAINT was brought in the Bench between Rolfe, widow, and Hampden, Knight, in *Essex*,

In attain, the plaintiff cannot give any other evidence than was given on the former trial, tho' the defendant may. And the jury must find accordingly, if the evidence given to the first jury be sufficiently strong to support their verdict, tho' they know that verdict to be false. A parol will of land devisable was good at common law.

6. E. 6. 72. a.

16. H. 8. 11 a.

Plow. 345. b. Perk. 570. 476. 579. 13. E. 3. F. Devise, 10. Wen. 7.

4. Eliz. 212. a. 7. E. 4. 29. b. 3. M. 129. b. 26. Aff. 1. & 12. 27. Aff. 61. Hob. 227. 1. Roll. Ab. 295. P. 1. 285.

upon a verdict given against the plaintiff in a writ of entry on a disseisin brought against the said defendant by the said Rolfe; and for evidence the last will of one Butler (who was a man learned in the law) was shewn in an old paper-writing without any probate in the ordinary's court, although there were in it also testamentary dispositions, as legacies, and the making of executors, and without any subscription or seal. (12) And to prove this will were three witnesses; but two depofed upon the report of others, and the third depofed of his own knowledge, and his name was in the will as a witness; but the land had been in other hands, against the will, for twenty years and more. And notwithstanding all these proofs, the jury gave a privy verdict against the plaintiff and the will, by which means the plaintiff was nonsuited. (13) And there it was agreed for law, that a will of lands may be well enough proved by witnesses without writing or probate before the ordinary, wherefore it is not necessary for a will of lands to be in writing and under the ordinary's seal; *quod nota* (a). But the jury paid little regard to the testimony aforesaid. (14) And there it was also plainly holden to be law, that the plaintiff in attain cannot give more in evidence, nor bring forward more witnesses, than he hath given to the petit jury; but on the other hand, the defendant may give more in affirmance of the first verdict. And upon this point there was much contention between the counsel, because the plaintiff gave more, &c. (15) And therefore it was said by the Court, that it would

(15) *M. 19. Jac.* in the Star Chamber, *Adams v. Canon* [Ley, 68.], an action brought for maintenance in divers suits, and alleged in particular that he disbursed money for one *Powel* in an action which *Thomas Hood* brought against him in chancery; and to prove this he produced two witnesses: one who was sworn depofed, that he himself knew it to be true; and being examined why he would swear that, answered, Because his father had said so. And in this case much was said about the depofition of witnesses: First, That if

(a) By 29. Car. 2. c. 3. § 5. Devise of lands must be in writing, &c. But the probate is evidence of a will only of chattels, Bul. Ni. Pri. 245. But where a will of lands was lost, LORD HOLTY, in one case, 1. Ld. Raym. 731. admitted it to prove such will concerning lands (and see Bull. Ni. Pri. 246); and in another case, 1. Ld. Raym. 732. rejected it. But if the original will

exist, that must be produced, and the spiritual court may be compelled by order out of chancery to deliver it out upon security. 2. Str. 961. *Sed qu.* Whether, if the will be lost, the memorial registered according to the provisions of 2. & 3. Ann. c. 4. 6. Ann. c. 35. 7. Ann. c. 20. & 8. Geo. 2. c. 6. might not be evidence?

be wisely done to have the evidences written; but because it was not, the Court examined always the witnesses upon their oath, whether they gave the same evidence as at first or not. So MR. SHELLEY, in recapitulating the charge and evidence, admonished the jury to look to the evidence which was given to the first jury upon which they passed; for he affirmed it to be law, that if they had pregnant and manifest proof and evidence to confirm the matter, although that were in fact false, and the truth of the matter was contrary, still they ought not to regard that, * but ought to weigh in their consciences what themselves would have done upon the same strong evidence as the first jury did; for *homines sunt mendaces, & non angeli, &c.*

* [54. a.]

Dier, 222. b.

[3. Black. Com. 404.
Bull. Nl. P. 222.]

one witness depose of his own knowledge of the very point in question, and the other in the circumstances, that shall be sufficient ground for the Judge to pass sentence; and this was said by MOUNTAGUE, *Chief Justice*, but then president of the council. Secondly, That it is not satisfactory for the witness to say, that he thinks or persuadeth himself; and that for two reasons by COKE: 1st, Because that the Judge is to give an absolute sentence, and therefore ought to have more sure ground than thinking; 2dly, The witness cannot be prosecuted for perjury; 3d, That Judges, as Judges, are always to give judgment *secundum allegata et probata*, notwithstanding private individuals think otherwise. And so *Canon* was discharged.

Michaelmas Term.

34. Hen. 8.

The King against Peter Richards.

The assignee of the king's patentee cannot plead the letters patent without making a *proffert* of them.

Raft. Shipping, 8.

(17) [T is enacted by the 4. H. 7. c. 9. [10], That no person shall convey into this realm wines out of Gascony except in *English* ships, &c. and whereof the master and mariners are *English*, &c. under pain of forfeiture. And

(17) The king by his prerogative may license any one to trade with unlawful commodities as well as lawful, *Rot. Parl.* 29. H. 6. No. 15. and *Claus. ann.* 19. H. 3. Thus *Rieb.* 11. (as appears from the bill signed 20. R. 2.) gave leave to merchants of *Newcastle* to carry wools and fells to any other port besides *Calais*, which was renewed to them *annis* 5. 21. & 30. H. 6. He granted to *Benedict Barony*, merchant of *Flanders*, *non obstante* any statute in restraint, sixty sacks of wool. So H. 4. disposed of a great quantity of tin; and H. 7. raised great sums of money by granting leave to merchants to trade with inward and outward commodities, as to *Alonso de Burges* great quantities of woad *anno* 6to. and a multitude of other kind of grain and other forbidden things, as in 20, 21, 22. as appears from the agreement between H. 7. and *Dudley*.

H. 3. *Jac. B. R. Rot.* 128. Information against *Hawes*, upon the statute 5. *Eliz.* for shipping and transporting sheepskins; and he pleaded a grant of the queen *Eliz.* *anno* 37. to one *Gilbert Lee*, to transport 200,000 annually for ten years to come, &c. [2. Hawk. Pl. Cor. 551, 552.]

the

the present king granted to a man his license in the ninth year, *that he, or his deputies, factors, or assigns*, might convey, &c. in any ship, notwithstanding the said statute, six hundred tuns of wine of *Gascony*, without saying any thing of the mariners, &c. (18) And by the statute 32. H. 8. c. 14. it is enacted, That the said statute should be in full force and virtue, so that from henceforth no person shall attempt to do any thing contrary to the tenor and effect of the statute aforesaid, upon the pain limited in the said statute. (19) And now one *Peter Richards* was sued by information in the exchequer for forty tuns imported into the kingdom in *April* last past, contrary to the form of the said first statute. And he pleaded this license as assignee for the forty tuns, without shewing the king's letters patent, and also without a *profert* of the deed of assignment: but he averred by prescription, that among merchants there is such a custom, that every man having a license of this sort may assign it by parol, &c. without an averment of the life of the first grantee. (20) And upon this plea was a demurrer in law, and well debated by many Serjeants and the Barons of the exchequer; and by the better opinion the plea is bad without a *profert* of the letters patent. But as to the matter in law, they did not think so. *Quare*. And by the report of *BARON FORTESCUE* judgment was given for the king in the same Term for the insufficiency of the plea, but not upon the matter of law. *Idea quare inde*.

Dyer, 52. a.
Rast. Shipping, 10.
14. H. 7. 13. a.

31. H. 6. 14. 9. Co.
95. b. B. N. C. 255.
2. Bull. 186. 3. Keb.
81.

9. Co. 57. b. Plowd.
81. b. 148. b. Dyer.
135. a. 34. H. 8. Bro.
Custom, 59. Co. Lit.
110. b. 1. 9. 10. Co.
46. 104. 88. Plow. 431.

[See note (a) to fol.
73. b. pl. 12. post.]

28. H. 8. 29. b. a.
R. 3. 12. a.

[See note (q) to fol.
29. pl. 200. ante.]

* [54. b.]

(21) **TENANT IN TAIL** made a feoffment before the statute of 27. of the now king [c. 10.] to the use of his wife for life, remainder to his son and heir in fee; and afterwards the statute is made, the feoffor died, and also his wife, and the * son entered. *MOLINEUX* moved, Whether he should be remitted to his estate tail, or not? And he thought that he should not; for the statute vests the possession in him as he had the use before, and that was of a fee simple; wherefore, &c. But his issue shall be remitted. *Quare*,

Tenant in tail, before the statute of Uses, enfeoffs to the use of his son in fee, he shall not be remitted after the statute to his estate tail, but his issue shall.

28. H. 8. 23. b. Plow.
111. a. 6. E. 6. 77. b.
34. H. 8. Bro. Remitter,
49. B. N. C. 251. Plow.
114. a. 207. a. Hob.
235. 235. 3. Mar.
129. a. Dy. 221. a. 111.
191. b. 51. b.

[See Co. Litt. 347. b.
and note by Mr. Butler
(1), and 348. a. b.]

Sawyer *against* Sliffield.

A. tenant in tail in right of his wife, made a feoffment to the use of himself and his heirs, and died; the feoffees, at the request of *B.* the issue, made a lease for years; the wife then died, and *B.* entered upon the termor, and made another feoffment to the use of himself and wife and his own heirs, and died, leaving issue within age; and then the statute of Uses passed: after the death of *B.*'s wife his issue is not remitted, and *A.*'s cannot avoid the lease.

Simile, M. 6. E. 6. and M. 2. Msr. Co. Lit. 348. b. Dy. 51. b. 129. a. 106. a. Hob. 255. Plow. 114. a. 207. a. B. N. C. 119. 251.

[Supra, pl. 21.]

(22) **A** WOMAN tenant in tail took husband, who made a feoffment before the statute 27. H. 8.

[c. 10.] to the use of himself and his heirs, and had issue by the woman, and died. The feoffees, at the request of the issue, made a lease for years; the wife died; the issue entered upon the termor, and made a feoffment to the use of himself and his wife, and the heirs of himself, and died, his heir being within age: the statute passed, the wife died, the heir within age entered upon the termor, whose name was *Sawyer*, and took distress for *damage feasant*; and *Sawyer* brought replevin against him, whose name was *Sliffield*: and this matter was pleaded to prove a remitter of the tail.

(23) And upon this a demurrer in judgment. And the entry on the roll is, *Hil. 34. Rot. 501.* And note, such a case as this, *s.* Tenant in tail made a feoffment to the use of himself and his heirs, the feoffees granted a rent charge, the feoffor died, his issue being within age; then came the statute of 27.; now, Whether the heir be remitted to the entail? And it was ruled that he is not, in the case of *Simons v. Chapman, T. An' Rot.*

Easter Term, 34. and 35. Hen. 8.

Lord Burgh's Case.

Tenant *in capite*, before the statute of Uses, suffers a recovery to the use of *A.* his son, and his wife, and the heirs of *A.*'s body; after the statute *A.* has issue, and dies; the issue shall not be in ward to the king during the life of his grandfather.

(1) **T**HE king's tenant of lands holden *in capite* before the statute 27. [H. 8. c. 10.] suffered a common recovery against himself to the use of his son and heir apparent, and his wife, and the heirs of the body of the son; since which statute the son had issue, and died, the issue being within age: Whether he should be in ward to the king, or

(1) *H. 36. Eliz.* In the exchequer chamber, the case of *Arundel's* case, for respite of homage. Tenant of the king made a gift in tail by license; the donee died, his issue within age; and a great question and argument *pro* and *con.* Whether the issue should be in ward to the king, or the donor? It was not adjudged, but adjourned.

out

out of ward, during the life of the wife? (2) And by the opinion of BROMELEY, *King's Serjeant*, HORWOOD, *Attorney General*, SWESTER, *Attorney of the Wards*, BROOKE, and others, the issue shall be out of ward, living the king's tenant, who was the donor of the use, who was *Lord Burgh*, and declared this use by * indenture of covenants on the marriage of his son with the daughter of *Sir David Owen*, for the sum of one thousand marks, since which covenant the said recovery was had; for the ancient use of the fee-simple remained always in the father, since he did not express any use in fee-simple; and then by the statute the possession was vested in the son and wife, as the use was, and the fee-simple in the father, as he was the donor of the use, and not as one in remainder of a novel fee-simple: for this would alter the case, &c. (3) So the same *Lord Burgh* was seised of land in possession, and in use, and made covenants of marriage *ut supra*, that his eldest son, *immediately after his decease, shall have in possession or in use all his lands according to the same course of inheritance as then they stood*; and that all men *now seised* and to be seised should be seised to the said use and intent. The son died, his heir within age, Whether the heir should be in ward of the king? was the question. (4) And it depended upon this, Whether the fee-simple of the

The same tenant being seised of land in possession, and in use, covenanted that *A.* immediately after his decease should have in possession or in use all his lands according to the same course of inheritance as they then stood in, and that all persons then seised or to be seised should be so to the same use. The use of the fee-simple in the father is not changed, and *A.*'s heir shall not be in ward.

Dy. 237. a. 8. b. Hob. 30. Noy, 109. Ben. 112, 113. Stat. 35. H. 8. cap. 2. Plow. 237. b. 249. b. 4. H. 6. 20. a. 2. Co. 91. b. 9. Co. 126. 40. E. 3. 6. N. B. 143. 27. H. 8. 26. 4. 14. H. 7. 27. 4. H. 6. 19. 20. E. 3. F. Avowry, 126. Hob. 30. Winch. 36. 4. Mar. 134. a. 12 Co. 174. 93. b. [Wardship abolished by 12 Car. 2. c. 24.] Bro. Gard. 93. F. Gard. 8. 23. B. N. C. 389.

(2) By covenant that *his land shall remain, descend, or come to his son after his death*, the use is not changed. By 21. H. 7. 18. and Plowden, 307, 308.

(3) 35. *Eliz.* in dower by *Blithman v. B.* [Cro. *Eliz.* 279. and cited in *Chomlie's case*, 2. Co. 52. a.] the case was thus: A father, tenant in tail, covenants, in consideration of marriage with his son, that *after his death the lands shall descend, remain, and be, to the son and the heirs of his body*. And, *per Cur.* no use is raised, for it is an executory covenant, for the manner of raising an use in such a case is to covenant to stand seised to such use after such time, or that the land shall be to such an use, or that such an one shall be seised to the use. But here the words are words of covenant. Also the words of covenant give nothing besides that which the law gave before, for the law would give the land to the issue. Also, for that the covenantor is tenant in tail, the covenant is void And judgment was given accordingly. [But see 5. *Burr.* 1705.]

21. *Eliz.* MANWOOD and SHUTE, in the exchequer, agreed with this Book; otherwise, if the word "*descend*" be joined, for there he has his election how he will have it go. [21. H. 7. 18.] *†* 2. H. 7. 16.

E. 24. *Eliz.* A. seised of thirty pounds *per annum*, upon covenant that *he will suffer land of the value of twenty pounds per annum, &c. to descend and come to his daughter and heirs after his death*; by all the Judges, This doth not raise an use to the daughter, but she shall only have covenant, if it be not performed. And by ANDERSON, If these words of covenant might be *†* performed by operation of law, as by descent, in that case no use would arise; but otherwise, if it cannot be performed by act in law. And therefore, if the covenant had been that the twenty pounds *per annum* should descend to a stranger, or to the daughter and a stranger, there the use would arise.

Benl. [121. pl. 153.] reports the opinion of the Judges in this case, that no use is changed by such covenant, neither in the father nor in the son, for that is a mere covenant in action.

20. Eliz. 36a. b. 27.
28. E. 3. 80. 93.
1. And. 25. [3. Leon.
6.] Winch 36. 1. Le-
on. 199. Dyer, 102.
a. 235. a. 69. a. 162.
B. N. C. 184. Plow.
302. b. 307. b. 9. 7.
E. 3. 19. 2. a.

[See Vin. Ab. Tit.
Utes. (O. 4.) and 5.
Bac. Ab. 365, 366.
Shep. Touch. 489.]

use be now out of the father, and vested in the son by such words as above? And by the opinion of the aforesaid merit, the fee-simple of the use was not out of the father; for it is only a covenant, and does not change the estate in fee-simple; but the case, perhaps, would vary, if the words had been, that *immediately after his decease the land should enure and remain to the son. Quære inde.* And so, in their opinions, in none of the cases aforesaid shall the king have the ward.

Archdeacon Carowe's Case.

Two coparceners of an advowson, the younger in ward, the guardian marrying her sister, presents to the advowson in the name of both. Whether, upon the next avoidance after the ward is of age, the eldest shall present if her sister refuse to join?

2. Rol. Ab. 346, 7.
Inst. 166. b. 1. 9. E. 3.
2. a. 19. by Parne. 4.
H. 7. 8. b. 45. E. 3.
4. b. N. B. 33. M.
5. H. 5. 10. b. 38.
H. 6. 9. 45. E. 3. 12.
Bro. Presentation al Es-
glise, 35.

[See Watf. Clerg. Law.
68, 69. Mall. Qu. Imp. 74.
[1. Hen. Bl. 376. 402.
405.]

(5) AN advowson descended to two coparceners, one of them being within age, and in ward: the guardian married the elder: the church became void, the guardian presented in the name of both the sisters: and at another time the church became void after the younger was of age: and between archdeacon *Carowe* and another the question was, Whether she should present, or the elder? (6) And many thought that the elder should have the presentation, if the younger *would not join* with her. For that should be called the commencement of her turn, inasmuch as she had not the turn at the last avoidance, but it was indifferently done in the name of both: but some thought the contrary.

Quære.

A *quare impedit* shall abate if the plaintiff be made a knight. But he shall not have journeys accounts.

(7) THE plaintiff in a *quare impedit* was knighted pending the writ, for which the writ abated. Wherefore the plaintiff sued out a new writ by journeys accounts. And MOLINRUX asked, Whether this lies, or

(7) Parl. 20. E. 1. at London, The lord the king ordered that all Englishmen who have forty pounds or more of land in fee and inheritance, and who have been lords of the lands for three years, become knights at *Christmas*, &c. And hereupon there issued writs to all the sheriffs of England, and also to *Reginald de Gray*, for his bailiff of *Chester*, in form following: "The King to the Sheriff of *York* greeting. We command you, that in the next full county court you cause it to be publicly proclaimed, and to all those in your bailiwick whom it may concern, from us you make known, that they of the county aforesaid who have forty pounds of land in fee and inheritance, and who have held those lands and tenements for the space [&c.] before the date of these presents, and ought to be knights, but are not. that they take up the arms of a knight before the Feast of the Birth of Our Lord next ensuing; and in what manner you have executed this mandate, distinctly and clearly make known unto us at the Feast-day of St. John the Baptist next ensuing, and have there then this writ." Out of the Book of MR. NOY.

not? And SHELLEY was of opinion, That if * the writ ought to abate for such an act, which is not the party's own, (because he is (a) compellable by the king to be knighted), then, inasmuch as it shall be accounted his own default, he shall not have the journeys accounts: but he agreed that the Books are clear, that the writ shall abate.

E. 4. 19. a. 7. H. 6. 14. 15. 2. Inst. 597. Dy. 59. b. [1. Com. Dig. 80, 81. But now see Com. Dig. Abatement, H. 4.]

(a) But by 16. Car. 1. c. 20. None shall upon him, or suffer any molestation for re- be compelled to take the order of knight fufal.

Trewennarde against Skewys.

(8) **I**N ERROR in *B. R.* between *Trewennarde* and *Skewys*

upon a judgment in a writ of annuity, it was assigned for error, that judgment was given, that *he should recover his annual rent, and the arrearages thereof, as well those incurred before the suing out of the writ as those incurred since, which said arrearages in the whole amount to seventy-five pounds*; and that was a quarter's annuity more than what was really arrear. (9) And also it was assigned for error, that the jurors, after the charge was given, and before their agreeing in the verdict, eat and drank at their own costs; and this was challenged and entered before the taking of the verdict; and yet at the peril of the plaintiff the verdict was taken *de bene esse*. And by the opinion of the Court, neither of these is error. For as to the first, the judgment would have been perfect, if the arrearages had not been set out certainly, for that is only the clerk's place to do. (10) And as to the other point, they said, it had been often ruled, that for the jury to eat and drink, if at their own costs, is only a finable offence; otherwise, if it had been at the costs of one of the parties, for that induces affection and suspicion, &c. And yet see 14. H. 7. [29. b.] contrary, by *VAVISOUR*. (11) And also, in the first case, it appears well by the record what is the amount of the arrearages, for the day of the purchasing of the writ is put in certain, and the day of the judgment given, wherefore the mistake is a default of the clerk. So notwithstanding these errors they affirmed the first judg-

Judgment in annuity "for all arrears before and pending the writ, amounting to seventy-five pounds," which was more by one quarter's annuity than was incurred, is but a mistake of the clerk, and not error.

The jury's eating at their own expence is not error, but only punishable by fine.

Ante, 29. H. 8. 37. b. Noy. 44. Yelv. 5. 34. 39. H. 6. 20. 22. 25. H. 7. 1.

Dier, 317. a. 37. H. 6. 38. b. 1. 44. E. 3. 3. 18. a. Poph. 209. Palm. 510.

8. Co. 162. Cro. Jac. 569. 247. Hob. 88. Ben. 201. Moor. 298.

[Bul. Ni. Pr. 308. 2. Hawk. Pl. C. 221. 12. Mod. 111. a. Salk. 645.]

Dy. 78. a. 218. a. Owen, 38.

Infra, 218. a. Dr. and Stu. 157, 158. 14.

H. 7. 1. b. 13. H. 4. 14. a. 20. H. 6. 24. b. 15. H. 7. 1. 11. H. 4. 17, 18. 62, 63. B. N. C. 477. Fit. Examination, 17. Co. Litt. 229. Dyer, 65. b.

[16. and 17. Car. 2. c. 8. §. 1.]

(9) *Ante*, 37. pl. 45. *accord*.—If the eating and drinking be at the costs of one of the parties, and the verdict pass against him, it seems the verdict is good, and the jury may only be fined. 29. H. 7. 3. See *Co. Litt.* 227. b.

1. And. 183. 1. Leon.
81. 20. H. 7. 3. a.
8. Co. 162. b.
Inst. 227. 2. Cro. 21.
2. Keb. 237.
[1. Rol. Ab. Amend-
ment, F. 5. Com. Dig.
38. Dougl. 115.]

ment. *Accordant M. 20. H. fol. 3. and in Lib. Int. Tit. Inquest*, in a misdemeanour of the jury in *B. R.* and verdict against the king, notwithstanding, &c.

Trinity Term, 35. Hen. 8.

Yong against Sant.

* [56. a.]

Whether a man may avoid a feoffment made by his father who was born deaf and dumb?

Pasch. Ult. Rot. 555.
Pas. 5. Jac. Cro. 105.
39. H. 6. 42. a. 2.
H. 4. 8. a. Bro. Ef-
chest, 4. 14. H. 3.
F. Brief, 877. Brac-
ton, 421. a. 6. Co. 28.

Br. Feoffments, 7.
Went. 21. Inst. 42. b.

[Perk. Grants, sec. 25.
and see sec. 21. Com.
Dig. Ideot, D. 5.]

(12) **T**RESPASS *quare clausum fregit* was brought by *J. Yong* against *Sant*. The defendant pleaded in bar a feoffment of one *Wm. Yong*, and gave colour to the plaintiff; to which the plaintiff replied, That the said *Wm. Yong* was his father, * and he is his son and heir: (13) and that the said *William*, from the time of his birth until the day of his death, was deaf and dumb, and being so deaf and dumb made a charter of feoffment of the land where the said trespass, &c. the which charter he sealed, and so sealed did deliver upon the land to the defendant; which said delivery of the charter, &c. is the same feoffment specified in bar (a): (14) And then the said *Wm.* died, and the plaintiff as his son and heir entered, and was seised until the defendant committed the trespass. And upon this the defendant demurred in law.

(13) A man deaf and dumb from his birth is *non compos*; but not if by accident. Yet deaf, blind, and dumb by casualty is *non compos*; and therefore he cannot be a lessor, by *WAKERING*, Reader of *Lincoln's Inn*, June 1626: [1. H. H. P. C. 34. But it seems he should be born blind, as well as deaf and dumb. 1. Black. Com. 304. 2. Black. Com. 497.]

(a) But by 4. Geo. 2. c. 20. Ideots, lunatics, &c. by direction of the Lord Chancellor, may assign trusts and mortgages, and be ordered to make such conveyances in like

manner as trustees and mortgagees of sane mind. And his Committee has no power to make leases of his lands. 2. Willf. 132.

Richards le Taverner's Case.

If a lease be made of land with a stock of sheep, and all the sheep die, Whether the rent shall be apportioned?

(15) **A** MAN makes a lease for years of land and of a stock of sheep, rendering certain rent, and all the sheep died: it was asked upon the indenture of *Richards le*

(15) One leased a certain house and goods, rendering rent, and then granted the reversion of the house to *Alderman Dixi*, of *London*; and holden clearly, that he shall have debt for all the rent. And the case of the *Greyhound*, in *Fleet Street* [Post. 212. b. 1. And. 4. Bendl. 81.] was cited to be adjudged accordingly. And *ANDERSON* cited Φ 30. Ass. 5. accord. But he granted, that if I make a lease to one of goods, rendering annually a rent, I shall have debt at the several days of payment. *M. 26. 27. El. C. B.*

Taverner,

Taverner, Whether this rent might be apportioned? And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder: otherwise is it if part be recovered or evicted by an elder title, then it is apportionable. (16) And of this opinion were BROMELEY, PORTMAN, HALES, *Serjeants*, LUKE, *Justice*, BROOKE, and several of the *Temple*. But MARVYNE, BROWN, *Justices*, TOWNSHEND, GRIFFITH, and FOSTER, *contra*; but all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by MORE, in the following *Lent*. And it seemed to him, and to BROOKE, HADLEY, FORTESCUE, and BROWN, *Justices*, that the rent should be apportioned, because there is no default in the lessee.

R. 541. Dier, 110. a. 82. a. 3. Cro. 607. 12. H. 8. 11. b. 7. 15. H. 7. 12. b. 14. b. B. N. C. 52. 11. Aff. 13. 5 Co. 4. a. 17. a. Perk. 130. 3. Bulst. 291. a. Bulst. 7. 1. Rol. Ab. 235. 16. 236. (c) 1. 2. 10. Co. 128. a. Stiles, 48. 20. H. 6. 23. a. 9. E. 4. 1. 2. 9. Eliz. 257. a. 21. E. 4. 29. Reg. 235. b. Dier, 360, 361. 4. b. 3. Co. 22.

[Gillb. on Rent, 186, 187. 4. Bac. Ab. 370. But see 1. Term Rep. 310. 710.]

(17) **A** WRIT OF RIGHT, *quia dominus remisit curiam suam domino regi*, was brought by a man and his wife, the wife being within age; the wife appeared by her next friend, who was admitted by the court, and the tenants vouched the common vouchee, who entered and joined the wife upon the mere right, and afterwards made default; upon which final judgment was given as well against the vouchee and his heirs, as against the tenants and their heirs. *Quod nota.*

On default of the vouchee after the wife joined upon the mere right, judgment final shall be against the vouchee and tenant, and the heirs of both.

East. 31. H. 8. Rot. 336. Simile, M. 30. H. 8. Rot. 523. [Post. 104. b. pl. 12.] 2. Cro. 293. 1. Ro. Rep. 303. 1. Bulst. 159. Post. 103. b. pl. 8. 5. Ca. 86. Palm. 228. [3. Com. Dig. 140. Booth. Real Actions. Carth. 47.]

* [56. b.]

(18) **T**HE condition of a bond was such, that if a stranger should pay to the obligee ten pounds at a certain day, then the bond should become void. In debt upon this bond the defendant pleaded, that a stranger paid to the plaintiff at the said day an horse or other thing, in full satisfaction of the ten pounds, which he accepted; judgment *fi actio*, &c. And this was holden to be a good plea. So, if the obligor himself had been bound to payment, * inasmuch as the plaintiff himself had accepted of that in recompence of the sum: (19) and he himself may well dispense

A. gives a bond, conditioned that B. shall pay twenty pounds to the obligee, acceptance by the obligee of an horse in satisfaction, is a good discharge of the bond. *Scus*, if the payment had been to a stranger.

4. H. 8. 1. a. 36. H. 6. Bar. 166. [Cro. El. 46.] 9. H. 7. 17. a. 5. Co. 119. [2. Will. 86, 87.] 30. E. 3. 22. b. Plow. 291. a. Bro. Condis

tions, 4. Co. Litt. 209.
a. 32. 33. 36. H. 6.
9. 16. 8. b. 2. 8. 22.
E. 4. 2. 14. 25. 36.
H. 6. 11. b. 4. H. 7.
4. a. 5. Co. 23. 4.
21. H. 7. 7. 12. 42.
E. 3. 23. 34. H. 6.
17. b. Ante, 46. a.
Post. 69 b. Perk. 754.
755. 3. Bulst. 30. 2.
Cro. 560. [Co. Litt.
212. b. 1. Com. Dig.
98.]

with his own dues by such means: but if the obligor had been bound, that a stranger to the condition should pay (or himself should pay) to a stranger to the bond, who had accepted such a recompence, that is no bar, because it ought to be strictly performed according to the condition. And so note the diversity, by the opinion of the Court. Same point, *Easter, 27. H. 8. fol. [1. a. pl. 1.]*

Reade against Bullocke.

Bond to perform all covenants and agreements in an indenture, release of all covenants, releases the agreements also; but is no discharge of covenants already broken.

[Powell on Powers, 23.]

Co. Lit. 285. a. 291,
292. 3. Leon. 69.
[Cro. Eliz. 14.]
1. Co. 112. b. 10. 151.
b. 5. Co. 71.

Bro. Release, 56.

24. E. 4. 2. a. 2. E. 4.
29. b. 8. Co. 154. b.
Dy. 50. b. Inst. 292.
b.

(20) **I**N debt on a bond indorsed with this condition, *that if the defendant perform all covenants, grants, conditions, and agreements, contained in a pair of indentures, that then, &c.* the defendant pleaded the indenture, in which were divers covenants, and a rent reserved, and said, that after the making of the aforesaid indenture, s. on such a day the plaintiff released and remitted by his deed, which he shewed, &c. *ad primum diem Maji*, which should be in the year of Our Lord, &c. (which was after the making of the release) all covenants in certain indentures, &c. specified, which were the same indentures, and prayed judgment *fi actio, &c.* And note, that between the making of the bond and the indenture (which bore the same date), and the making of the release, there were five years. And to this plea the plaintiff demurred in law; and it was argued at the bar by RUSHTON and BROMELEY, and also by the Judges, and by their opinion the plea was bad.

(21) And first it was argued, that (*ad*) shall be taken as "*until*," by which word the covenants *in esse* at the time of the making of the release, and which were in the mean time before the extreme time of the first day of *May*, should be comprehended: which was denied by SHELLEY. And although it be not so taken, still the release is good for the covenants which were *in esse*; and these words following in the future tense shall be holden void: as if I release to you *all actions which I. S. hath against you*; these last words are void (*a*), and the first good for the same actions; for by the subsequent words a deed may be qualified and refrained, but not utterly destroyed. (22) So, Whether

(a) So if a release be limited as to one obligee, provided the other shall not take advantage of it, such proviso is void. *Everard v. Herne*, Lit. Rep. 191. But if the release

be given to one before the other have sealed the bond, he will not be discharged. Cro. El. 161.

a release may take effect in a future time or not? And it seemed an infallible maxim, that a man cannot release an action or right, but shall have it: as *Littleton* saith [§. 446]. But *SHELLEY* thought that a deed might lie by, and grow to perfection, as a grant or lease to commence at a distant period. And it was here the intent of the parties that the release should not take effect till the first day of *May* ensuing. (23) And he thought this doctrine honest, and wished it were used, s. that * every man skilled in the law would construe a deed after the intention of the maker, as far as by his ingenuity and reason he is able: for he thought, If a man disseise my father, and I make a release, and deliver it to one *A.* to keep as my deed, and to deliver it over to the disseisor at his pleasure; in this case if my father die, and then he bail the deed to the disseisor, that is good to bar me: which *BALDWIN* denied; for it is contrary to the nature of a release to take effect afterwards; but if he had bailed it as an escrow to be delivered as his deed at the death of his father, perhaps the release there would have been good. *Quere tamen inde*; for then that hath relation to the time of the first delivery, at which time the releasor had no right to release. (24) Also it was moved, Whether all agreements are released by this word *covenants*, or not? And *BROMELEY* thought that they are, for every covenant implies an agreement; and therefore in 41. *E.* 3. [10. a.] and 21. *E.* 4. [6. b.] it appears, that where a man made a lease for years, rendering rent by indenture, in which no covenant was, and the conclusion of the deed was, "for the fulfilling of which said covenants the lessee bound himself in ten pounds," &c.; and for these ten pounds debt was brought; and in each reservation of the rent there is an agreement of both parties, s. on the part of the lessor for the reservation, and on the part of the lessee to take at such rent. And therefore *SHELLEY* said, That it is common enough in the Books that the lessee shall have an action of covenant against a lessor if he be ousted by the lessor himself, or by any other who has title to enter, yet no word of covenant is comprised in the indenture of lease; and for like reason the lessor shall have covenant against the lessee for non-payment of the rent, if he choose; for this word (*rendering*) is as much the word of the lessee as of the lessor; which *BALDWIN* denied. (25) And admit that all agreements be also re-

19. H. 6. 62. a. 21.
E. 4. 46. b. Dr. and
Stru. 17. 19. H. 6. 17.
a. per Hodye. Dyer,
52. a. 217. b. 42.
E. 3. 24.

* [57. a.]

[Cowp. 725. 3. Term
Rep. 473.]

39. E. 3. 23. 1. H. 7.
14. 8. H. 7. 13. a.
Cro. 88. a. Dy. 167.
Plow. 344. a. 19. 27.
H. 6. 74. b. 8. b.
Perk. 29. a.

3. Co. 35, 26.

Stiles, 406.

22. H. 6. 58. a.

N. B. 145. L.

46. E. 3. 4. b. 47.
E. 3. 13. b. 9. H. 6.
43. b. 48. E. 3. 2. b.
32. H. 6. 32. b. 9.
Eliz. 257. b. 4. Co.
83. Plow. 67. 21.
H. 7. 37. b. 47. E. 3.
22. a. 14. H. 8. 25. a.

10. Co. 51.
Rol 159.

leased by releases of covenants only ; Whether, by the dispensing with the covenants of indenture, the bond which was made for the performance of it be also released and dispensed with ? as BROMELEY argued that it should be, inasmuch as the bond is accessory, and depends upon the indenture, and the determination of the principal determines the accessory also. Whereupon he put many common cases of re-disseisin, and annuity with penalty, and of rent, for default of payment of which a condition of re-entry is reserved. (26) But BALDWIN and SHELLEY thought this not similar, for here the obligation is the principal cause of this action of debt, and is a thing separate from the indenture ; and he may have separate actions for the breach of the indenture, s. covenant if he please, and also debt on the bond : and both actions lie together, and are several things, and although the party release the one, that doth not release the other. (27) For in 41. [E. 3. 10. a.] for a sum of money bailed to * keep until the plaintiff was assured of certain land ; if he be not assured, and the other bail the money over, debt or account lies at the pleasure of the party, and although he release the one, he may maintain the other. So here ; for by the breach of one covenant the bond is forfeited, then is it changed into another nature. (28) Then here it is not alleged by the defendant, that in all the mean time between the making of the bond and the release, he had performed all the covenants, grants, and agreements, which he ought to have alleged, or else the plaintiff is not fully answered. For it stands together that the covenants were broken at one time, and then by the release of the covenants of the indenture, the bond which was forfeited is not dispensed with ; and therefore judgment was given for the plaintiff (*ut audiui*) of the same Term.

4. Co. 80. b. 1. H. 7.
10. b.
Plow. 235. a.

2. R. 3. 21. a.
8. Aff. 34.
Dyer, 27. a.
3. Cro. 245.
33. H. 6. 2.

[Dougl. 101. 2. Term
Rep. 482, 483.]

* [57. b.]

8. Co. 153. Dyer, 20.
28. H. 8. 20. a.
18. E. 4. 23. 28. E. 3.
7. Det. 146.

1. H. 7. 10. b.

24. H. 8. 15.
[5. Com. Dig. 235.]

Michaelmas Term,

35. Hen. 8.

Lord Zouche's Case.

(1) **A** CESTUY QUE USE for life, remainder over in tail, made a lease for the term of the life of a lessee, and died; and the lessee continued his estate: What estate shall he have? And it seemed by the opinion of the Judges of the one Bench and the other, that he shall only be tenant by sufferance, for the lease doth not make any discontinuance of the remainder, because he hath authority by the statute 1. Rich. [3. c. 1.] to make a lease, grant, or feoffment; but that should be understood only of such estate as he can legally make. And this was the case of *Lord Zouche* of lands in *B.* in the county of *Somerset*.

If a *cestuy que use* for life, remainder over in tail, make a feoffment *per auter vie* and *die*, the tenant is only at sufferance.

[Jenk. c. 5. c. 20. S. C.]
4. H. 7. 18. a. Ow.
28. Moor. 39. Godb.
319. Plow. 350. Post.
60. b.
Raft. Uses, 4. Bro.
Feoffment al Uses, 22.
Dyer, 24. 59. b. Plow.
4. 349. Bro. Feoffment
al Uses, 48.
[Co. Lit. 270. b. Mr.
Butler's note (1). Via.
Ab. Estate, D. c. 2.
Black. Com. 150, 151.]

Saunders against Griffin.

* [58. a.]

(2) **I**T was moved in the case between *Saunders* and *Griffin*, before the *Lord Chancellor* at his house in *Cannon Row*, that if a man have feoffees to his use, and he make a lease on the first day of *May* for twenty years, the term to commence at the Feast of *Midsummer* then next ensuing, and his feoffees make a lease, bearing date the 2d day of *May*, of the same land, to the same lessee for the term of thirty-four years, the term to commence at the said Feast of *Midsummer*; and this lease was made at the request of *cestuy * que use*; *Quære*, Whether this latter lease is good? because the feoffees have not authority to make a lease, the first lease being in force. (3) And that was not

A *cestuy que use* made a lease for twenty years, to commence at *Midsummer*; his feoffees, by his request, the day after, made another lease of the same lands to the same lessee for thirty-four years, to commence at the same *Midsummer*. This is no surrender in the lessee of the first lease, but a confirmation of it, and enures as a new one for fourteen years more.

Cestuy que use in tail makes a feoffment and

(2) By acceptance of a future lease, to commence several years after, a present lease shall be surrendered immediately, because the lessee, by acceptance of the new lease, has affirmed the lessor's power of making it. 5. Co. *Jue's* case, fol. 111.

dies, the freehold is not in the ancient feoffees immediately by the death without their re-entry.

[See Shep. Touch. 274. 1. Inst. 338. a. and note (2) there. 3. Bac. Ab. 462. 5. Com. Dig. 513.]

2. Rol. Ab. 494. Perk. 111. 6. Co. 69. Bro. Surrender. 21. 37. H. 6. 180. 11. Eliz. 280. a. 4. H. 7. 10. b. Co. Litt. 383. 22. E. 4. 37. a. Plow. 142. 423. 3. H. 6. 17. 5. Co. 116. 14. H. 8. 15. Dyer, 46. 5. 10. Co. 11. 53. and 67. Plow. 432. b. 421. Dyer, 26. a. 112. a. 2. Rol. Abr. 6. 9. H. 7. 24. b. 7. E. 4. 20. Co. 126. a. Dyer, 28. b. 283. 60. 33. a. 19. H. 8. 13. 27. H. 8. 20. b.

[See Plow. Com. 348.] 4. H. 7. 18. a. Plow. 350. Dy. 274. a.

[3. Bac. Abr. 438, 439.]

a surrender (a) of his first lease, inasmuch as the lessee never had possession, but the term was in him to grant and forfeit. But it was said that the last lease was good and effectual, because the feoffees had lawful and usual authority in the land to make a lease in this case, inasmuch as the term was to commence, and executory, but not commenced and executed. And also it was said, that this lease of the feoffees should be accounted as a confirmation of the first years, and a new lease of fourteen years more. As if I make a lease to one to-day, and to-morrow I make a lease for more years, this surplufage is good. *Ideo quære* of this point. (4) It was likewise moved, that if a *cestuy que use* make a lease for years, and afterwards during the term make a feoffment of the land, and make livery in other land in the name, &c. Whether any-thing shall pass by this feoffment? because he had nothing in use, nor in possession, and then the statute does not aid. *Ideo quære*. (5) So also *cestuy que use* in tail made a feoffment, and died; it was moved, Whether the freehold should be adjudged in the ancient feoffees immediately by the death of tenant in tail without their re-entering? And as it seemed, it shall not. And afterwards the parties themselves submitted to the order and award of the Lord Chancellor concerning the title of the lease which was claimed by *Saunders*.

(a) By 29. Car. 2. c. 3. §. 3. No leases, estates, or interests, either of freehold or terms of years, or any uncertain interest not being copyhold or customary interest of, in, to, or out of any messuages, manors, lands,

tenements, or hereditaments, shall be surrendered, unless by deed or note in writing, signed by the party surrendering, or their agents lawfully authorized by writing, or by act and operation of law. 2. Willf. 26. 49.

Arthur de Clopton's Case.

The king having an honor, part by descent or purchase, part by attainder, tenure as of that honor shall not be *in capite*.

12. Co. 136. 33. H. 8. 44. a. 13. H. 7. 16. a. 28. H. 6. 11. b. 46. E. 3. 11. b. 42. Aff. 6. 6. 47. 49. E. 3. 32. 21. 24. 2. Inst. 65. [1. H. H. P. C. 254. Vin. Ab. Tenure, L. 2. Wood's Inst. 175, 176. Bac. Ab. Tenure, E.]

(6) NOTE, It was holden in the court of wards and liveries to be law in the case of one *T. Arthur de Clopton* in the county of *Somerset*, that a tenure of the king as of the honor of *Gloucester*, two parts of which come to the king by descent or purchase, and the third part by the attainder of the late *Duke of Buckingham*, shall not be holden to be a tenure *in capite* of the king as of his person, nor shall give prerogative of other lands to the king, as was decreed in the case of the heir of the said *Arthur*, who was in ward to the king by reason of the said tenure by knight's service, as of his honor, *ut supra*.

(7) **A** BISHOP made a lease for life, and afterwards the lessor granted the reversion of the same land to another, *habend' et tenend'* the aforefaid land, with the rest of the premises, to the aforefaid * *A. B.* and his assigns, when afterwards, either by the death, &c. of the said tenant for life it shall happen to be vacant, until the end of the term of twenty years thence next ensuing, with a clause or warranty by him and his successors, and with a letter of attorney to deliver seisin to the grantee accordingly. And he did so. *Quere*, Whether this grant be good without (a) attornment, or not, *s.* as a new lease? or, Whether the continuance again of the lessee in the occupation of the land be an attornment in law? And this grant was confirmed by the dean and chapter of *Wells*: but the chapter of *Bath* was dissolved by the suppression of the priory before the said grant. And now the successor would avoid this lease for these two causes, *s.* for default of attornment in the life of the bishop's predecessor; and also, for that part of the chapter had never assented to the grant. *Quere*.

Lease for life by a bishop, who grants the reversion for years, which is confirmed by one of his chapters only, the other being dissolved; Whether the continuance of tenant for life is good attornment, or this grant shall be effectual as a new lease without attornment? Also, Whether this confirmation by one alone be sufficient? *22. Plow. 152. 155. 6. Co. 36. Dy. 26. a. 46. b. 377. 124. 178. a. 118. a. 127. b. 37. H. 8. Br. Attornment, 41. B. N. C. 298. 467. Lit. §. 576. Plow. 150. 163. Noy. 94. Dyer, 282. b. Latch, 238. Dyer, 61. a. 239. a. F. Grant, 104.*

[Co. Litt. 301. a. 3. Bac. Ab. 379.]

(a) Attornment now unnecessary, by 4. Ann. c. 16. §. 9. Dougl. 242.

Hilary Term,

36. Hen. 8.

Taverner's Case.

(8) **T**HE king made a lease to one *John Taverner* of a rectory, rendering certain rent, *s.* the value of the benefice and four pounds more; and there was a clause of exoneration granted by the king to discharge the lessee from *all and singular pensions, † portions, and sums of money*, issuing out of the rectory. And the question in the court of augmentations was, Whether the lessee be bound to find the curate, or the king? (8) And by the opinion of many, if a common parson make a lease of his parsonage for years, reserving rent, and no clause is in the indenture, who shall be bound to find a curate? the lessor, who is a parson, shall do that, because the service of the cure is a spiritual adminis-

The king granting to his lessee of a rectory an exoneration from all pensions, &c. should find the curate. So of a common parson, who leases his parsonage without such clause of exoneration.

Davis Rep. 36. 28. E. 3. 93. b. 11. H. 4. 4. 9. H. 6. 52. 21. H. 7. 3. b. &c.

[† This word is in the earliest edit. 1592, but omitted in all subsequent.]

Lit. Rep. 57.

tration, and cannot be leased, and the service is not issuant out of the parsonage, but is annexed to the parson. *Quere.* And at length, by decree, the lessee was allowed four pounds towards the curate's stipend.

Easter Term, 36. and 37. Hen. 8.

Wildshire against James.

A lease by a prior and convent of a manor, with the appurtenances, and the rents of all the tenements of the said manor, tithes of corn, perquisites of courts, and all other emoluments, the advowson of the church there, &c. excepted and reserved; the exception shall be taken to begin at the words "*advowson of the church*;" and the lessee shall have the perquisites of the courts.

[* 59. a.]

Roll. Contin. 361.
31, Eliz. 288, b.

Perk. 122. 5. E. 3. 66.
Livery, Diet, 97.

(9) THE Prior and Convent of *Christchurch*, in the county of *Southernhampton*, made a lease of their whole manor of *Fleet*, with the appurtenances, in the county of *Dorset*, together with a dove-house, and the rents of all the tenements of the said manor, with the tithes of corn belonging to the church there, fines, heriots, perquisites of court* thence coming, and all other emoluments and profits to the said manor belonging or forthcoming; the advowson of the church there, and wrecks of sea, and probates of the spiritual courts there, and fines of wills there proved, and other profits of the spiritual courts there (to hold of the said prior and convent and their successors,) only excepted and reserved. (10) And note, that the Prior and the Convent were parsons of the church there, and had spiritual jurisdiction. The doubt was, Where the exception commenced? and, Whether the farmer should have the letting, setting, and perquisites of courts, or not? And by the opinion of many, the farmer should have it, for the exception commences only at *the advowson of the church*, &c. and cannot be taken otherwise, for then the lease would be repugnant in itself, for every emolument and profit appertaining to the manor would be reserved to the lessor, because those words come after the *tithes of corn*, where some thought the exception commenced, because this word "*and*" conjoins the last word of all that which the lessor purposed to lease, *s. rent*, but that cannot be, (11) And for another reason also, for the nature of a saving or exception is, to except

except and restrain part of the thing before spoken of or granted, and not of a new thing not spoken of or granted; and then tithes of corn should be excepted, which is a novel thing, and not leased by any words before; for they are of a different nature from the manor. Wherefore, &c. And this was the case of *H. Wiltshire* against *James*.

Plow. 370. a. Rok
Continuance, 281.
Perk. fol. 119.
[Co. Lit. 47. a.
1. Wood's Con. 260.
Shep. Touch. 75. & 77.]

Nichols against Haywood.

(12) **I**N *C. B.* the case between *Nichols* and *Haywood* was,

That in debt upon a bond, the defendant pleaded *non est factum*, and the plea was entered, and a *venire facias* for the jury, and then before the day of appearance of the jury, the bond, by the negligence of one of the clerks, who had it in his custody, was eaten by mice, and the labels of the seals also; so that the deed was insufficient: and then, at the day of the trial, when evidence was given to prove the deed, the defendant demanded sight of the deed, and at length this was shewn. (13) And by good advisement and discretion of the Judges of both Benches, the jury was charged to enquire if that was the deed of the defendant at the time of the plea pleaded, or not; and further to find the special matter, if they find it to be the deed of the party: and accordingly they did find the special matter, and prayed the advice of the Court. Same point, *4 T. 2. E. 3. 22.* in attain.

Upon *non est factum*, the eating of the seal by mice after the issue joined, and before trial, does not vacate the bond, if the jury find that at the time of plea pleaded, it was the defendant's deed.

5. Co. 119. b. 3. E. 3.
F. Imprisonment, 23.
Co. Lit. 283. a. 6. 27.
E. 3. 43. b. 45. b.
3. H. 7. 5. a. 2. Bull.
247. Cro. 21.

[Gillb. Law of Evid.
170. Bull. Ni. Pr.
171, 172. Shep. Touch.
71. 5. Com. Dig. 249.]

Dier, 112. 47.

[Vin. Ab. Facts (X).]

(12) 41. *Eliz.* in the case of *Worsley* and *Charnec*, [Moor. 570.] agreed, that judgment should be given for the plaintiff, notwithstanding that accident, and it should never be assigned for error, that there was no such bond.

E. 30. Eliz. C. B. Michel v. Stockworth and Andrews, [Ow. 8.] the jury found a special verdict, *viz.* That the defendants sealed the bond, and delivered it to the plaintiff as their deed, and that since issue joined, and before the day at *nisi prius*, the seal of *Andrews* was taken away. By *RHODES*, *ANDERSON*, and *PERIAM*, the plaintiff shall recover.

Debt on bond against two; the seal of one is crushed and broken: by the opinion of the Court, that avoids the whole deed, although the bond were joint and several, for that implies jointly. And by *FENNER* and *WILLIAMS*, it is immaterial what destroyed the seal. *E. 3. Jac. B. R.* [See 2. Mod. Ent. 298. §. 6. Salk. 574.]

H. 30. Eliz. WINDHAM and *RHODES* cited this to have been adjudged by themselves in the same Term, and that the plaintiff recovered, *E. 1. Car. B. R.*

After a *withernam* awarded, the writ of second deliverance lies not for the beasts taken in *withernam*, but for the first distress.

N. B. 74. 5. H. 5. 7. b.

2. Inst. 347.

Dier, 41. b. 42.

Cro. 92. b.

33. E. 3. Avowry, 256. Second Deliverance, 10.

[F. N. B. 170. note (2).
Gillb. Replevins, 97.
173. &c.]

* (14) **T**HE defendant in replevin had a return awarded upon a nonsuit of the plaintiff, whereupon he sued out a writ of *retorn' habend'*, upon which writ the sheriff returned the beasts eloigned by the plaintiff, and upon that a *withernam* was awarded; and upon the *withernam*, defendant had as much chattels delivered to him of the goods of the plaintiff; and upon this the plaintiff must sue out a second deliverance: and, Whether he shall sue out a second deliverance for the first distress, or for the *withernam*? was moved in the Bench. And by the opinion of the Court, *s. SHELLEY and BROWN*, the second deliverance shall be for the first distress taken, and not for the *withernam*; and so ought the law to be, if the nature and form of the writ of second deliverance be considered.

(14) *E. 41. Elis. C. B. & Spilman's Case*, the plaintiff in replevin is nonsuited, the defendant hath a return awarded, the sheriff returns *elongata*, upon which a *withernam* is awarded; and plaintiff, in replevin, sues out a second deliverance for the beasts taken in *withernam*. *ANDERSON*, that it lies; but the other Judges *contra*, by a writ of second deliverance, but a special writ should be sued out. And *SCOT*, the prothonotary, said that it was so, and that there were precedents of it.

Dame Latimer's Case.

By the word *utenis* in a will, plate and jewels do not pass.

A legacy of money to his daughter *for and towards marriage*, is an absolute gift, and if she die unmarried, her executors shall have it.

2. Bulf. 126. 129.

Went. 361.

(15) **A**T the chambers of *E. MOUNTAGUE*, Lord Chief Justice of the Common Bench, in the case of the *Queen* against the issue of *Lord Latimer*, it was moved, that *Lord Latimer* having, by his will, given and bequeathed to his wife "*the third part of all his goods and chattels, whether she had a right to them or not*;" *quare*, Whether she shall only have the third part of the goods and chattels, after the other legacies paid, or the debts paid, or the third part of the

(15) Note, that *M. 3. Jac. B. R. WILLIAMS* said, that if one devise that his daughter shall have twenty pounds at the day of her marriage, or on the day of her arrival at twenty-one years of age, if the daughter die before, the executors shall not have it. But otherwise, if the devise had been to the daughter, to be paid at her age of twenty-one years, or at the day of her marriage, for in the last case it is a debt immediately; which *YELVERTON* agreed to. *Br. Devise*, 27.

DODDERIDGE, 11. *Jac.* in one *Robert's Case*, [2. Bulf. 123, &c.] agreed to the difference put here, because the testator meant, in this last case, a future and contingent advantage, and not a present one,

whole,

whole, the debts, &c. not deducted. Also, Whether the third part of the debts due passed by these words "*goods and chattels*?" (16) Also, Whether plate or jewels should be implied by the word "*utenils*?" And all thought that they should not.

He also gave and bequeathed to his daughter Catharine five hundred marks for and towards marriage; and she appointed her executors, and died before marriage. *Quære*, Whether the executors should have this money? And all in a manner thought that they should. But holden otherwise by the Judges in *Serjeants Inn*, H. 3. Eliz. for a legacy of money towards marriage to be paid at the day of marriage, or at the age of twenty-one years, and she died before either of them took place. But *per* DOCTOR REDE, by the civil law it is otherwise. Same point, H. 14. El. in the case of *Worsley*, where administration of their legacies was committed to the mother of the devisees; and the executor of the testator discharged against his will.

5. Mar. 164. a. 21. E.
4. 21. b. 25. H. 8. 5. b.
Bridg. Rep. 80. Went.
347. 16. Eliz. 329. a.
B. N. C. 50.
[Wentw. 252. Swinburne on Wills, 185. 507, 508. 510. Com. Dig. Chancery, 3. Y. 7.]

A legacy to B. towards marriage, to be paid at the day of marriage, or at the age of twenty-one, does not vest till one of the events takes place.

49. E. 3. 16. Dier, 49. a. Swinburne, 192. b. 156. b.
Post. 329.

[See 1. Eq. Caf. Abr. 294, 295. 1. Br. Caf. in Chan. 300. 2. Black. Com. 513.]

Executors of Skewys against Chamond.

(17) **I**N B. R. the case was thus:—One *W. Trewynard* was imprisoned upon a writ of *exigent* which issued upon a *capias ad satisfaciendum*, at the suit of one *Skewys*. And he so being in execution, a writ of privilege of parliament issued to *R. Chamond*, then sheriff of *Cornwall*, reciting, that *Trewynard* was a burgess, and also the custom of the privilege of parliament; by virtue of which writ the said sheriff, during the time of the last session of the last parliament, holden in 35. H. 8. let him go at large: and thereupon * the executors of *Skewys* brought debt against the said *Chamond*; and upon this matter they demurred in law.

A member of the house of commons is privileged from arrests during the session of parliament, but after such session may be taken again.

And although he were not privileged, the sheriff is not liable for an escape in giving him his liberty upon the writ of privilege directed to him for that purpose.

* [60. a.]
2. E. 4. 8. a. 1. Keb. 660. 5. Co. 93. a.

(17) These doubts are now remedied by the statute 1. Jac. c. 13. which gives a new execution against him who is set at liberty for privilege of parliament, and for discharge of the sheriff, &c.

Jo. Rep. 171.

E. 4. 8. 2.

Dier, 27. a.

(18) And there are three things to be considered here. 1st, Whether the privilege be allowable in this case, for a burges of parliament being arrested upon a writ of execution? 2^{dly}, If the privilege be allowed, whether the party, by this enlargement, shall be clearly freed from execution for ever as against the plaintiff, or only for the time of parliament? 3^{dly}, Admitting that the privilege be not allowable in this case, still whether the sheriff, by this writ and warrant of the king proceeding from parliament, shall be sufficiently excused and discharged against the plaintiff from this debt?

(19) And as to the first, the privilege seems allowable; and for a proof of that it is necessary to consider the constitution of parliament, which consists of three parts, *s.* the king, as the chief head; and the lords, the chief and principal members of the body; and the commons, *s.* knights, citi-

(18.19) Lord & Mordant and another fined in the Star Chamber, *ore tenus*, for not coming to a parliament, summoned 9th Nov. 3. Jac. on the first day, although they came in good time after the first day.

T. 3. Car. B. R. *Hodges and Moore's Case*. [Latch. 48. 150. Noy. 83.] The defendant, being a burges of parliament, brought to the Court a letter of the speaker of the house, to stay proceedings; and disallowed by the whole Court, for the defendant ought to have brought a writ of privilege (*a*). And when THORPE was speaker of the parliament, he had a general *superfideas* for all actions, and that was bad. The parliament is privileged for their persons, not for law proceedings; and it is contrary to the oath of the Judge to stay proceedings for any letter. In a bill exhibited under H. 4. it is shewed, "that the lords, knights, &c. and their men and servants, &c. (*b*) should not be arrested or otherwise imprisoned by no custom of the realm; and it is prayed, that if any be, the parties offending may make fine and ransom, and give damages, &c." Hereunto the answer is, He hath sufficient remedy in the case. Rot. Parl. 5. H. 4. Act 71.

In the beginning of Queen Eliz. *John Broxham*, being plaintiff in assize against *William laughey*, it was ordered, that an injunction should issue out of chancery, upon pain of five hundred pounds, that the plaintiff should not proceed to trial. Parl. Journals, 1. Eliz. Feb. 21. To this may be added the case of *Bogod Clare* and the *Prior of St. Faith, London*, 18. E. 1. Rot. Parl. 1. dorio.

And in the same parliament, the master of the *Temple* petitioned that he might distrain for rent in an house in *London* that the *Bishop of Suini David's* held of him, in which he might not distrain during parliament. But the answer was, that it seemed not honest that the king should grant, that they of his council in the time of parliament should be distrained, but at another time he might distrain by the doors and windows, as is the custom. Pet. Parl. 18. E. 1. Rot. 7.

(a) He must now be discharged upon motion, since 12. & 13. W. 3. c. 3. by ten Judges in *Holby v. Pitt*, 2. Str. 689. Rep. temp. Hard. 28. S. C. Fort. 142.

(b) This privilege from arrests seems to be taken away from the servants by 10. G. 3. c. 50. (made to supply the insufficiency of the former statutes' (12. & 13. W. 3. c. 3. 2. & 3. Ann. c. 18. 11. G. 2. c. 24.) which, after enacting, that from and after 24. June, 1777, all suits may at any time be prosecuted

against any peer or lord of parliament, or against any member of the house of commons, or against any of their menial or any other servants, or any other person entitled to privilege of parliament, says, "provided nevertheless, that nothing in that act shall extend to subject the person of any of the knights, citizens, and burgeses, or commissioners of shire and burges of the house of commons for the time being, to be arrested or imprisoned upon any such suit or proceedings."

zens, and burgeffes, the inferior members; and then they make up the body of the parliament. The elections also of those members must be considered, with what circumstance and solemnity they are elected, the mode of which appears from the statutes made concerning it; and when they are elected and returned into parliament, it is understood of all men, that they are the most wise and discreet persons in the kingdom to treat of a common weal. And so is the writ of summons to parliament, that the election shall be of the most grave and discreet men, &c. And after that they are returned, their personal attendance is so necessary to parliament, that they ought not to be absent, for any business; and no one person can well be dispensed with, because he is a necessary member; and therefore if any one die during the parliament, a new one shall be elected in his place, so that the entire number ought not to be wanting; and then it follows, that the person of every such member should be privileged from arrests at the suit of any private person during the time that he is busied in the affairs of the king and his realm (a). And this privilege hath been always granted by the king to his commons at the request of the speaker of the parliament on the first day, &c. (20) Then it is evident to common sense, that inasmuch as the king and all his realm has an interest in the body of every one of the said members, the private advantage of any individual ought not to be considered; for it is a maxim, *quòd magis dignum trahit ad se minus dignum*. As was the case in 6. E. 4. [4.] That if a man be condemned in trespass, or re-disseisin, and in execution for the fine to the king, if he be outlawed for felony, his body shall not be imprisoned at the suit of the party, because the king hath interest in his body. Wherefore, &c. (21) So we may conclude that this court of parliament is the most high court, and hath more privileges than any other court in the kingdom. Wherefore it seems that in every case, without any exception, every burgeff is privileged, when the arrest is only at the suit of a subject; and the case here is more favourable, inasmuch as execution was sued out during the parliament, in which case the plaintiff had an election either

B. N. C. 325.
Stiles, 252.
8. E. 4. 8.

Dier, 162. b.
245. b. 297. a.

6. E. 4. 4.
29. E. 3. 13.
[2. Bl. Rep. 756, 757.]

2. 4. E. 4. 1. 8. b.
Flow. 399.

(a) This privilege from arrests is understood to continue for forty days before and forty days after every meeting of parliament. The house of commons has never made any express limitation, but left it at large to a

convenient time *eundi et redeundi*, of which themselves only are the judges. 2. Lev. 72. 2. Str. 985. Rep. temp. Hardw. 28. 1. Bl. Com. 165.

7. H. 7. 2. a.

60. H. 8. 36. b.

8. E. 4. 18, 19.

2. E. 4. 8. b.

21. H. 7. 27.

Br. Custom, 46.

Note, Stat. 1. Jac. c. 13.

1. Rol. Ab. 903. 13.

Fl. 8. 16. a. Davis,

32. b.

Plow. 372. 7. H. 6.

32. Dier 275. a.

27. Aff. 49. Plow. 322.

b. N. B. 79. a. Br.

Villanage, 38. 39. E.

3. 6.

5. Co. 87. Br. Vil-

lenage, 47.

30. E. 1. F. Villanage,

46.

Dier, 57, 58, b. 4. H.

7. 18, 19. H. 8. 13. a.

Di. 274. a. N. B. 25.

B. 6. Co. 30. 14. H.

8. 3.

4. Mar. 140. a. 8.

Co. 142. a. Dier, 124. a.

to sue out execution against his body, or his lands and goods. And also * every privilege is by prescription, and every prescription which founds for the common weal is good, although it be to the prejudice of any private individual. (22) As in the times of E. 4. [8. E. 4. 23. a.] it was holden a good prescription to dig in the soil of another, adjoining to the sea, to make bulwarks against the king's enemies. Wherefore, &c.

As to the second matter, it seemed that the party is not discharged for ever from execution, but only for a certain time, for it is not impertinent for a judgment to be at one time executed, and at another executory. (23) As if a fine be levied with remainder over after the tenant's death, a stranger abates, and he in reversion recovers by *sci. fa.* and afterwards the recovery is reversed for error; now he shall have a new *sci. fa.* or his heir shall, although it was once executed, for the cause hath now ceased; and also for the same reason, the person of a man may be privileged for a certain time, yet he afterwards shall be imprisoned: as if a villein enter, and live in ancient demesne for a year, the lord afterwards cannot seize him; the law is the same; the king's presence is to him a sanctuary; and yet at another time the lord may seize him back for the same reason, &c. And there is a diversity, where the body of a man in execution is set at liberty by the authority of the law, and when without authority, and only of the head, and at the risk of the sheriff himself, for the law shall save all rights; as in the cases of villeins aforesaid, they are by the law privileged for a time, but if the lord himself enfranchise them by manumission in fact or in law for one hour, that is for ever in *favorem libertatis*. (24) So is the law made by statute, that *cestuy que use* may enter and make a feoffment, and that shall bind the feoffees, yet *cestuy que use* in tail making a feoffment is no discontinuance. The law also is, that the bishop shall present by lapse in default of the rightful patron; yet his presentment which is given by authority of law, shall not prejudice the rightful patron; wherefore here this enlargement by writ is but a privilege *pro tempore*, and not a discharge in *perpetuum*. (25) As is the case cited in 6. E. 4. [4. a.] The execution of the party to have the body in prison was suspended for a time, till the king had pardoned him the felony; but afterwards it revived, as was there adjudged, Wherefore it seems,

seems, &c. Then it follows, that no action is given against a sheriff for an escape, unless in a case where the principal debtor is discharged, for it is not reasonable that the plaintiff should be twice satisfied for the same debt. Wherefore, &c.

(26) And as to the third point, it seemed that the sheriff is not chargeable, for if no default or *laches* can be ascribed to the sheriff, then is it not reasonable to charge him; and it seems none in him, for the office of a sheriff is chiefly in the execution and service of writs and process * of the law, and he is the immediate officer for this purpose, and he is sworn to do it, and therefore is bound by his office and oath to make a true return: and the law intends him to be a lay person, and to have no skill in the science of law, and whether a writ comes to him by authority or without authority, he cannot doubt or dispute it; and therefore if a *capias* come to him without any original, and he serve it, he is excusable from false imprisonment: so is the law if a *capias* or *exigent* come to the sheriff against a duke or earl, where it does not lie against such, &c. (27) And to prove that the sheriff is not bound to take notice of the law, the writ *de homine replegiando* wills, that the sheriff shall make deliverance of the body, unless it were taken by special commandment of the king, or of the Chief Justices, or for the death of man, or for the king's forest, or for any other right for which he may not be replevied according to the custom of *England*. And yet by the statute of *Marlbridge*, c. 8. the sheriff shall be amerced if he deliver a prisoner for re-diffisin without special precept: and so the statute of *West.* 2. c. 11. of servants and bailiffs ordains, that if one be condemned in arrears before auditors, and committed to the next gaol, the statute hath a *caveat* to the sheriff or gaoler that he shall not deliver him by *homine replegiando*, or otherwise, without the consent of the master: and yet if the party sue by his friends, and obtain a writ of *ex parte talis* returnable into the exchequer, he may let him go at large: and notwithstanding that he be once discharged, if it appear upon the examination of his accounts that he was in arrears, and duly committed to prison, he shall be remanded to prison until, &c. (28) And grant that the sheriff had disobeyed this writ, what hurt would have arisen? Truly danger of perjury, and also of imprisonment of his body and ransom at the will of the king. And this was in ure in the same parliament

6. Co. 52. a. 54. a. 24.
H. 8. 16. Cro. 24.
11. H. 4. 49. Dier,
162, b. 17. E. 3. 35.

* [61. a.]

Plow. 12. b. 5. H. 7.
4. b. 12. H. 7. 14. b.
21. H. 7. 22. b. Cro.
86. b. 20. H. 6. 33. b.
9. H. 6. 21. 7. E. 3.
24. a. Cro. 89. a. 99.
6. Co. 54. a. 9. 68. a.
10. 76. b. N.B. 66. E.
Register, 77. b. 8. H. 5.
2. b. Long Quinto E. 4.
132.

N. B. 125. F. 130. A.
13. E. 3. Fit. Bar, 253.
2. Inst. 381.

[Post. 168. b. pl. 19.]

Moor, 57. † viz. 33. H. 8.
Crompton's Courts, fol.
9.
1. Jac. 13.

liament against *Rowland Hill* † and *Suckley* the sheriffs of *London*, who were committed to the *Tower* for their contempt, because they would not let *George Ferris*, who was arrested upon an execution, go out at large, when the sergeants at arms came for him, without any writ; and perhaps the fear of this very precedent prevented *Chamond* from disobeying the writ of parliament, which is the highest court in the realm.

(29) And it appears plainly by the writ, that they were clear in the parliament, that the party ought to have privilege in this case, for otherwise the writ would only be an *habeas corpus cum causâ*, which writ is often granted before the Judges are agreed whether privilege lies in the case or not; and if they find that it is not grantable in the case, then they remand the matter with a *procedendo*, &c. wherefore, &c. And although parliament should err * in granting this writ, yet it is not reversible in another court, nor any default in the sheriff; wherefore.—*Quære sequelam hujus placiti.*

* [61. b.]

g. Co. 75 b.

(a) Easter Term, 38. Hen. 8.

The bishop must confirm, as well as the dean and chapter, a grant of parcel of the prebend, or it shall not bind the successor.

Dy. 58.b. 238.b. 106.b.
R. 2. Grants, 104. B.
N. C. 395. Plow. 530.
[See 3. Bac. Ab. 376.
Wats. Clerg. L. 478.]

(30) A PREBENDARY in a cathedral church made a lease for years of parcel of his prebend, and the dean and chapter confirmed the estate: *quære*, If that shall bind the successor without the assent of the bishop? And many thought that it should not, inasmuch as the bishop is patron and ordinary of every prebend. *Ideo quære*, for common usage is against it. See † 8. Ed. 3.

(a) There is a little confusion and variance as to the Terms, in the several editions. *Hil.* 36. and *East.* 36. and 37. are not marked in the old one of 1592; but parted off in those of 1621 and 1688; and in MS. this is entered

in the old edit. as *East.* 38. though not parted off in any printed book; yet the top of the page shews such Term: but these inaccuracies are of no consequence.

Whorwood against Lord Lisle.

(31) **I**N the court of wards was this case between *Mrs.*

Whorwood, late wife of *Wm. Whorwood*, the attorney-general, and *Lord Lisle*, admiral: The said *Wm. W.* was seised of an estate of inheritance of lands and tenements to the value of three hundred and sixty pounds, in which the said wife was a joint purchaser with her said husband of sixty pounds in the purchase of the husband, which purchases they had as well of the king as of others. And besides this, the said *W. W.* by his last will declared, "*that his said wife should have during her life the third part of all his lands and tenements with the said lands which she had in jointure, the said part to be assigned by his executors, if it were not contrary to law.*" And now she refusing her said jointure of sixty pounds demands the third part of all the land, *s.* one hundred and twenty pounds, as a legacy by the said will; and also the third part of the residue, *s.* eighty pounds as her dower: and, Whether by law she should have her demand? was the question. And at length by agreement it was decreed and ordered, that she ought to have the legacy, *s.* the third part of the whole; and besides that she should have forty pounds of the residue for all her dower: so she had one hundred and sixty pounds for her support.

(31) *M. 25. Eliz.* in the argument of the case it was cited as law, and adjudged *5. E. 6.* That an husband made a jointure to his wife during coverture, and devised to the wife for life a manor over and besides her jointure, and died; she waived the jointure; adjudged that she should not have the manor, for it was devised to her for the enlarging of her jointure; so was the intention of the testator.

A man having 360l. in land, in 60l. of which his wife was a joint purchaser with him, devised to her the third part of all his lands besides her said jointure: she waived the jointure, and demanded a third part of all as the legacy, and then a third part of the residue for her dower: the legacy was adjudged her as she demanded it, and 40l. given by agreement for the whole of her dower.

3. Co. 28. 27. a.

Stat. 27. H. 8. c. 10. Uses, 9. 6. E. 6. Bro. Dower, 69. Dy. 248. a. B. N. C. 421. 5. Car. Cro. 171. 5. Eliz. 220. a.

(32) **I**T was agreed in the exchequer, by the advisement of the Judges of the one Bench and the other, that where there was an information upon the statute of pluralities of farms [21. H. 8. c. 13.], that the defendant had seven farms lying in several villis in *Essex*, which villis were in four several hundreds, that if four of the jurors have nothing within any of the four hundreds, nor live within any of them, that is sufficient cause of challenge for the hundred (a).

In an information upon 21. H. 8. c. 13. where the farms lie in several hundreds, if four of the jurors have not land nor live in any of the hundreds, that is good cause of challenge.

Raft. Residency, 2.

B. N. C. 480. 28. Aff. 38.

(a) See the note (b) to fol. 25. a. pl. 156. ante.

Pennington *against* Morfe.

In affize, the plaint may be abridged of that part demanded of which the jurors have not had the view, and they may give possession of their own knowledge.

[Booth, Real Act. 290. 1. Vin. Ab. 110. 1. Com. Dig. 84.]

[Booth, Real Act. 282. Godb. 209.]

* [62. a.]

If a termor after surrendering continue possession and pay rent, it is optional in the lessor to consider him as tenant by disseisin or at sufferance.

[1. Bur. 112. 2. Bl. Com. 150, 151. Co. Lit. 57. b. note (5), 270. b. note (1). See Cowp. 243. 482.]

Warrant of attorney to three to make livery *conjunctim et divisim*; Whether livery made by two in the presence only of the third be sufficient? If he had been absent, it would have been clearly bad.

[Co. Lit. 52. b. note 2, Vin. Ab. Feoffment (Q).]

2. Bac. Ab. 501. and 1. Bac. Ab. Authority (C).] 39. E. 3. 10. b. 28. E. 3. 41. a. 13. H. 4. 11. b. Noy, 47. Hut. 127. 13. E. 3. F. Plaint, 11. Dyer, 65. b. 88. b. 7. Aff. 19. Dy. 84. 19. H. 6. 43. a. Br. Aff. 70. 27. E. 3. 78. b. Cro. 116. b. Cro. 96. 14. H. 8. 12. a. 4. Mar. 134. b. 4. Co. 24. a. Dier, 173. a. 7. H. 7. 15. 7. E. 3. 70. a. 5. Co. 91. a. 94. b. Co. Lit. 181. b. Dier, 310. b. 11. Co. 92. a. 21. 39. H. 6. 6. 40. 21. E. 4. 46. Cro. Jac. 553. Allyn, 4. 1. Rol. Ab. 329. 7. 3. Bull. 210. 2. Rol. Rep. 101. 27. H. 8. 6. b. 20. H. 6. 13. b. Dier, 375. b. Perk. 38. 5. E. 3. 7. Yelv. 26.

(34) *M. 8. Jac. B. R. & Bower and Wood*, A diversity where the surrender is out of the land, and where not: for in the first case, after entry he is a disseisor; in the last, at sufferance.

See 30. E. 3. 2. a. where the presence of the Judge of another place who had no authority in *B. R.* vitiated the whole.

(33) NOTE, That it was agreed by the Chief Justice and Chief Baron in affize in *Kent*, between *Pennington* and *Morfe* (where the plaint was of one messuage and four acres of land in *East Malling*), that the plaintiff might abridge his plaint of the messuage because the jurors had view only of the land. And this was of their own proper knowledge * without doing it by the sheriff. And it was holden, that this is sufficient view; for it was said, that if the jurors have such good cognizance of the thing in controversy that they may put the plaintiff in possession if he recover, that is good, although the sheriff never gave them the view, as the writ required. Also note, The examination of the view was by the *voir dire* of the jury upon oath.

(34) Also it was holden there, That if one tenant for years surrender his estate to the lessor, and still continue in possession, always paying the rent to the lessor, this is no disseisin to the lessor, unless at his pleasure; for here the case was, that the termor levied a fine to the lessor, and still continued.

The case likewise was, that three men were named in the deed as attornies to make livery *conjunctim et divisim*, and two of them made livery, the third being present, who neither said nor did any thing: Whether that be a good livery by reason of the presence of the third? But it was agreed, that if the third had been absent, it would have been bad.

Baker against Brook.

Trin. 3. E. 6. Rot. 140.

(1) **ONE Brook**, the parson of *Bosworth*, granted a certain annuity, or annual rent, &c. to one *George Medley*, issuing out of his rectory of *B.* to have, levy, and take, to him and his assigns during the life of the grantor; and this was *pro consilio impenso tantum*. And the grantee made a grant of this over; and for arrears after the grant the second grantee brought a writ of annuity, and alleged in his count the grant made to *Medley* as aforesaid, by virtue of which he himself was seised in his demesne as of freehold; and upon this the defendant demurred in law, Whether this annuity might be assigned? And there was much doubt and argument at the bar. And **POLLARD** urged, that it does not lie for the grantee, inasmuch as it appears by the count, that the first grantee was seised of it *in his demesne as of freehold*; wherefore he made his election to take it as a rent-seck, for it was granted out of the rectory of *B.* *Quere bene*, for no judgment was entered on the Roll.

An annuity granted *pro consilio impenso* may be assigned.

Mo. 5. [& Dal. 5. S. C.]
[See Mr. Hargrave's note (1) to] Co. Lit. 144. b. 5. Co. 41. a. 21. H. 7. 1. b. 41. E. 3. 9.

7. Co. 28. b. Good, if granted to him and his assigns, Maune's Case, Perk. 21. b. 27.
21. 5. 4. 20. H. 6. 4. 8. 2. a. 22. H. 6. 12. Plow. 281. b.
5. El. 221. b. 227. a. 2. R. 3. 5. a.

[Co. Lit. 17. b. Mr. Hargrave's note (4). Cro. Car. 170. 2. Wilk. 224.]

(1) [Moor's Rep. 5. pl. 13.] That the Judges **MOUNTAGUE**, **HALES**, **BROWNE**, and **HINDE**, were to have argued, and it was told them that the parties had agreed; and then they said, that they should have argued that the count was good; and so it was their opinion that the plaintiff ought to recover (a). 22. E. 4. 6. a.

(a) **DALISON** reports it of an annuity granted *pro consilio impofterum impendendo*; but **MOOR** 5. S. C. agrees with **DYER**.

Samuel against Johnson.

(2) **NOTE**, That an action of waste was brought by *Samuel against Johnson*; and the waste assigned was for cutting and topping forty ashes and twenty elms of the value, &c. and there was a demurrer in law, Whether that should be adjudged waste? And upon good consideration it was adjudged waste in *C. B.* in *Michaelmas Term*, in the first year of the now king, Rot. 719.

Lopping and topping ashes and elms is waste.

20. E. 1. F. Amendment, 67, Dy. 92. a. 90. b. Br. Wast. 136. F. Wast. 90. 108. 112. 124. 127.

Co. Lit. 53. a.

Earl of Arundel *against* Lord Windfor and Another.

Errors in affize.

One cannot be judge and attorney for any of the parties.

3. H. 7. 10. 32. 34. H. 6.
2. 51. 8. Co. 118. R.
177. Bro. 511. 47.
E. 3. 1. b. 38. H. 6.
18. b.

(3) **E**RRORS assigned in affize brought by the *Earl of Arundel* against *Lord Windfor* and one *Clerke*:

First, For that *Brice Rokewodde*, who is one of the two associated to the two Justices of affize, was attorney for the *Earl of Arundel* in the affize at the day on which one of the Justices was absent. Also at the first day of affize *Clerke* appeared, and said nothing in bar of the affize; upon which the affize was adjourned into the exchequer chamber to a certain day; at which day he made default, upon which the affize was awarded against him, where it ought to have been awarded on the first day of affize upon the *nihil dicit*.

(4) Also the plaintiff and defendant in affize differed about the land put in view out of which the rent issued; for the defendant said, that it was one messuage and fifty-five acres of land, and the * plaintiff said, that it was one fulling-mill, forty acres of land, six acres of meadow, and six acres of pasture, and the jury ought to have enquired into the truth of it, because it is very material.

* [65. b.]

Where the plaint is of rent, it cannot be abridged.

14. 45. Aff. 9. 13. 36.
H. 6. Plaint, 7.
[1. Vin. Ab. 110, 111.
3. Vin. Ab. 169. 1.
Com. Dig. 84.]
33. H. 6. 4. 2. E. 4. 10. b.
33. b. Br. Abridgment,
2. Leon. 16. 116. b.
Dy. 6. b. 88. a. 1. Cro.
104.
Dyer, 132. 9. H. 7. 5.
28. H. 6. 10.

(5) Also the plaint was of fifty-three shillings and fourpence rent; and afterwards the plaint was abridged to twenty shillings, which was admitted by the Court; which is error, inasmuch as the rent is an entire thing, and cannot be abridged, as land and such like. And also the jury ought to have enquired, and have found the whole title at large upon which the affize was awarded: and although it might be abridged, still the verdict is ill, nor is the judgment given upon it; for the jury found the seisin and disseisin of the entire rent, *s. "of the rent aforesaid in the said plaint specified,"* without regarding the abridgment; and the judgment was also given accordingly, *s. that he should recover the rent in the said plaint specified*, where it ought to have been of thirty-three shillings [fifty-three] and fourpence only, with an exception of that which was abridged. A similar judgment of more than was in demand on question, *H. 9. Eliz. fol. [258. a. b. post.]*

(6) Also it appears that five of the recognitors were sworn, and the rest appeared; and because they had nothing in the hundred of *A.* without saying *within which, &c.* and that they had not the view, therefore the affize remained to

7. H. 4. 47. a. 13. Aff.
11. 9. 19. H. 6. 66.

be

be taken ; where it appeared, that when four hundredors are sworn upon the principal it sufficeth, and that is the default of the Court.

(7) Another matter also was moved upon the rejoinder to the first error assigned, which was this, *s. in nullo est erratum* ; Whether this manner of rejoining in this case was good, or not ? inasmuch as it was averred by matter in fact, that the said *Brice Rokewodde* named in the writ of association, and the said *B. R.* who appeared as attorney for the plaintiff, was one and the same person, and not other or different ; which averment is issuable, and triable by the country ; and then the error is error in fact ; and where error in fact is assigned, the rejoinder is not *in nullo est erratum*, but he must answer to the error in fact, and upon that join issue. And notwithstanding this the rejoinder here is holden good enough, because by that it is agreed that *B. R.* and *B. R.* are but one and the same person ; and yet by the law that is no error ; wherefore, &c.

48. 5, 6. E. 3. 15. b. [Ante, 25. a. pl. 156. note (b).]

Where matter of fact is assigned, *in nullo est erratum* is a good rejoinder, if the defendant wish to admit the fact, but deny that it is legal error. But if he wish to dispute the truth of the fact in issue, he must plead it specially.

1. Roll. Ab. 763. Cro. Jac. 29. 8. Co. 110. 8. Co. 118. 4. B. N. C. 30. 7. E. 4. 16. a. 5. E. 4. 33. Dy. 104. 45. b. [9. Vin. Ab. 550, 551. 5. Com. Dig. 303. 2. Crompt. Pract. 394. 2. Bac. Ab. 218.]

* [66. a.]

(8) A QUESTION was asked upon these words in a lease, *s. " And it shall not be lawful for the lessee to give, sell, or grant his estate and term to any person without the leave of the lessor, upon pain of forfeiture of his said term :* the lessor and lessee die, and the executors sell the term without the leave of the heir. It was holden, that this is out of the case of forfeiture, because the restraint was only during the lives of the lessor and lessee. And yet it was agreed in the Bench, that the words above make a condition. See the same point *M. 5. M. fol. 152. pl. 7. postea.*

92. 2. Plow. 46. 7. E. 6. 79. a. 1. Roll. Ab. 408. 10. Co. 42. Rep. 425. 2. Black. Rep. 856. Shep. Touch. 141, 142. 130.]

These words in a lease, "*That it shall not be lawful for the lessee to alien without licence of the lessor,*" make a condition, but the restraint continues only during the lives of the lessee and lessor.

Co. Lit. 204. Dy. 46. 79. 152. a. 6. 1. Roll. Ab. 408. E. 8. Dr. & Stu. 123. Mo. 11. 1. Leon. 246. 31. H. 8. 45. b. 1. Rol. Rep. 70. Lit. 75. Dy. 138. 194. [3. Will. 140. 380. 2. Term

Mynours against Turke and Yorke, Sheriffs of London.

(9) SERJEANT MYNOURS brought an action of debt in the exchequer against *Richard Turke* and *Sir John Yorke*, sheriffs of London and of the county of *Middlesex*, and wardens of the gaol of *Ludgate*, &c. and

Debt against the sheriffs of London for an escape. Plea, that *I. and C.* before the day laid in the declaration, sheriffs of *L.* suffered the prisoner

to go at large in the county of S. and a demurrer. 1st, Because the escape might be before the time laid, and yet not during the time that L. and C. were in office. 2d, Because it is repugnant that the escape should be at S. while the prisoner was in custody at L. 3d, For not alleging the prisoner in custody at S. 4th, Because they neither traverse, nor confess and avoid, but only lay the blame on another.

5. a. 6. Br. Escape, 46.
Flow. 35. b. Noy. 3.

By. 67. a.

declared upon a record of a recovery in an action upon the case against one *Robinson* in the *Guildhall, London*: and shewed, that for the damages recovered he was in execution in the prison of *Ludgate* under the custody of *Barnes* and *Allen*, late sheriffs; and remained there in execution in the time of four sheriffs until the 15th day of *December*, in the third year of the now king; on which day the aforesaid defendants, being sheriffs of the city of *London*, and wardens of the said gaol, the said *Robinson* out of their custody at *London*, in the said parish of *Saint Martin's* in the ward of *Farringdon* within, did permit to go at large, the said plaintiff not being in anywise satisfied for his damages aforesaid, by reason whereof an action hath accrued, &c. (10) The defendants pleaded, that long before the fifteenth day of *December*, in the year of our said lord the now king, in the said declaration specified, s. on the twenty-third day of *September*, in the first year of the reign of our said lord the king, the said *John Robinson* then being in the aforesaid gaol under the custody of the said *R. Jerveys* and *Thomas Curteis*, then sheriffs of the said city of *London*, and keepers of the gaol aforesaid, in execution at the suit of the said plaintiff by force of the said judgment, the said *R. Jerveys* and *Thomas Curteis* then being sheriffs, and keepers of the gaol aforesaid at *Lambeth* in the county of *Surrey*, the said *Robinson* out of their custody did permit to go at large, the said plaintiff not being in anywise satisfied for his damages aforesaid; and this, &c. Upon which plea the plaintiff demurred in law.

(11) And the plea seemed insufficient, first for the uncertainty; for it says, that *before the fifteenth day of December in the year of our said lord the now king, in the said declaration specified*, and does not shew what year, for in the declaration three years of the present king are mentioned, and it may be intended to be the second year, at which time *Jerveys* and *Curteis* were out of office; and when a plea hath a double intendment, it shall be construed and taken most strongly against him who pleads it, by the rule of pleading in the second year of *Hen. 7.* [3. *H. 7.* 2. b. pl. 10.]. Also, it is repugnant in this point, for the defendants have surmised that *Jerveys* and *Curteis* suffered the prisoner to escape at *Lambeth* in the county of *Surrey*, he then being in their ward in the gaol of *Ludgate* in *London*, which is impossible,

for

5. H. 7. 10.

for they could not let him go at large out of their custody when he was imprisoned *, and in their custody at the time of the escape. And then the escape ought to have been supposed in *London*, where the prison is. (12) And it also ought to have been alleged by matter in fact, that *Robinson* was in their ward and custody at *Lambeth*, where he escaped; for it shall not be intended by the law, that the prisoner was removed into another county from that in which the gaol is, by the warden, unless it be specially furnished by the warden, as to say, that he had a special command of the king, or of his council, or of the chancellor by his writ. And also the prisoner shall have false imprisonment against his warden, if he remove him out of the prison into another county or liberty. (13) And for this matter see the plea in 15. E. 4. [20. b. 21. a.] in a writ of error, in the end of the plea; it was moved by *BRIAN*, that there was manifest error, inasmuch as it was not alleged that the sheriffs of *L.* had the prisoner in their ward in *Southwark* where the escape was supposed at the time of the escape; for by the judgment *Robinson* was committed specially to the gaol of *Ludgate* in *London*, there to remain until, &c. so that their power and authority to remove him to another place is restrained by the judgment here; wherefore, &c. (14) Then as to the substance of the plea, it seems that it is not any answer to the matter of which the defendants are impeached; for it is common doctrine that the defendant in his answer and bar must either traverse, or confess and avoid the plaint; and here they have done neither, for the matter of charge laid by the plaintiff is the escape made and suffered by them; and they do not excuse themselves from that, but accuse their predecessor, where they ought to answer for their own act and demeanor; and by the law of God every man should bear his own burden, and shall receive judgment according to his own deeds and merits, whether good or ill, as in the Creed *Quicunque vult, &c.* (15) And therefore if a man bring account against me as bailiff of his manor, and name the year, if I say that *I. S.* was his bailiff the same year without more, that is worth nothing without a traverse, yet in some special case a man shall excuse the tort, and shall traverse it over to a stranger. As in 33. H. 6. [1. a.] debt brought against the marshal for the escape of a prisoner being in execution on a condemnation, and if he plead that

Plow. 35. b.
Dyer, 121. 278. b.
22. H. 6. 38. 27. Aff.
91.

59. 4. 20. 30. H. 6. 6.

Plow. 38. a.

57. H. 7. 14. a.
Dy. 67. a. 109. a.

[4. Bac. Ab. 97.]

1. Rol. Ab. 808.
Dyer, 43. a.

4. Co. 84. b. 16. E. 4.
3. 4. 6. H. 7. 12.
12. H. 8. 1. Dy. 248.

[Vin. Ab. Escape, (N.)
2. Bac. Ab. 247, 248.
4. Term Rep. 789. 2.
Hen. Bl. 111. 4. Bac.
Ab. 71.]

10. H. 7. 26. a. 16. 5.
4. 3. a.

* [67, a.]

13. E. 3. Bar. 253.

N. B., 101.

15. E. 4. 21. a. R. 3.
21. 9. Co. 68. Cro.
Jac. 3. 8. Co. 142.
Cro. Car. 707.

B. N. C. 412.

Dy. 66. b. 3. Co. 71.
512. b. 13. H. 7. 1. a.
10. E. 4. 11. Hob.
202.

[See 8. & 9. W. 3.
c. 27. §. 6. 2. Black.
Rep. 1059. 2. Term
Rep. 126. 2. Will.
295. 4. Term Rep.
611.]

the prison was broken by the king's enemies, *s.* the *Scots* or *French*, or by sudden fire, which is the act of God, or such force or vehement power as he could not resist, this is good matter with a traverse, *s.* that he did not break the prison in any other manner, &c. But if it were done by rebels or traitors within the realms, the law is different, because he may * have remedy over against them.

(16) And note, If the defendants would take exceptions to the insufficiency of the count, because the record is not good and formal, it seems that they should not be received in that case, but should answer to the escape; for in *M.* 14. E. 3. [Fitz. Ab. Escheat. 6.] a writ of *escheat* was brought upon an outlawry of felony, which outlawry was erroneous, *s.* that he was outlawed at the fourth county court, &c. where it ought to have been at the fifth; and yet not allowed. And in 21. E. 4. fol. 28. [23. b. *sub fine* pl. 6.] upon a bill in *B. R.* it was holden for law that the gaoler should not take advantage of a discontinuance or error in the record, because he is a stranger to that, although he be charged by action brought upon this record for the escape, any more than a stranger shall falsify a recovery by a dilatory matter: (17) Note by *Brooke* in his *Abridgment*, title *Escape*, 45. 5. E. 6. that the successor may well plead the escape to have been in the time of his predecessor, and that he retook the prisoner, and imprisoned him, and delivered him imprisoned to the defendant at his entry into the office, and that he suffered him to escape; for that is confession, and avoidance, because he was not in execution by the second imprisonment to the party, and by consequence no escape in him.

Farington's Case.

Lease for years to two, (18) **A** LEASE for years was made to two, with a proviso in the end of the indenture, "*that if the said lessees die within the term, it shall cease*;" the lessees make partition. Where one alienes his part and dies, the lessor cannot enter into his part who is dead, but the grantee or

(18) *M.* 31. and 32. *Eliz. C. B. & Croshawick's case*: I lease to two for years, upon condition that they do not alien; they make partition, and one alienes his part, all is forfeited.

the executors of the lessee (if he do not aliene) shall have his part during the life of the survivor; and no occupancy shall be in such a case. And it is not as where a lease is made to two, "*for the term of their lives,*" and they make partition, and one die, his part shall revert to the lessor. And so there is a diversity, by SAUNDERS Serjeant, ATKINS, BROWNE, A. WESTON, and DYER, in the case of *Mr. Farington*.

during the life of the other. Had the lease been *for their lives*, the lessor should have it.
5. Co. 9. 3. Cro. 721.
Dy. 46 a.
30. Aff. 8. 4. Co. 73.
b. 74. 1. Co. 84. 8.
Aff. 33.
[See Mr. Hargrave's note (1) to Co. Litt. 192. a. 3. Bac. Ab. 200.]

(19) **MEMORANDUM**, That in this Term I inspected a certain record in the Bench of the Term of *Michaelmas*, 2. H. 6. Rot. 134. where the defendant in debt pleaded a release made to him by the plaintiff; which was denied by the plaintiff; upon which they were at issue. And afterwards the defendant *reliâtâ verificatione* * confessed the aforesaid acquittance not to have been the deed of the plaintiff, and upon this the plaintiff had judgment to recover, "*and let the said defendant, because he hath made use of the said writing of release which he now confesses to be false, be taken, &c.*" (Which note.) But the contrary was adjudged in debt by the earl of *Oxford* about the end of the year 33. H. 6. [54. b.] for the judgment was only an *amerciament* and no *capias*: but for the denial of his own deed, the judgment and entry is, "*for that he hath denied his own deed, let him be taken, &c.*" although he was not convicted of it by verdict, &c. (a)

* [67. b.]

Where the defendant pleaded a release by the plaintiff, and when issue was taken thereupon confessed the falsity of his plea, the judgment was entered for the plaintiff with a *capiatur* as to the defendant.
Cro. 42. 4. E. 2. Fines, 116. Cont. Noy. 4. Post. 101. a.
33. H. 6. 54. 17, 18. E. 3. 29. & 39. 18. 8. 11. 24. 28. Aff. 15. 6. 3. 9. 6. Aff. 4. 41. 8. Co. 60. 9. E. 29. 11. 34. H. 6. 29. 43. 1. Rol. Ab. 219. A. 1. 9. E. 4. 24. b. 45. E. 7. 11. a. 4. E. 4. 29. 16. 11. 26. Aff. 11. 26. 5. 24. E. 3. 73. 17. H. 7. Cro. Contr. 1. Rol. Ab. 224. G. 1. 2. H. 1. [4. Com. Dig. 179. 2. Bac. Ab. 514.]

(19) * *Hankford's case*, 42. *Eliz.* Defendant pleaded a release for twenty pounds to him; the plaintiff replied, *Non est factum*—found against the plaintiff—judgment was, that the plaintiff should be amerced.

E. 3. *Jac. B. R.* adjudged [Cro. Jac. 64.] If one deny his own deed, and afterwards confess it, judgment shall be that the defendant be amerced. Note the reason of *PRISOT, Justice*, 33. H. 6. 54. b. and of *LITTLETON*, in 9. E. 4. 24. But mark well 8. Co. 60. for it is contrary to these judgments. E. 16. *Jac. B. R.* * *Alderman Piot's case*. Debt on bond in the city of *Salop*; defendant pleaded *non est factum*, and afterwards, *reliâtâ verificatione*, confessed the action and judgment, "*idro in misericordia*"; and upon that error was brought; and this case, and 8. Co. 60. cited that it ought to be "*capiatur*;" but on the other side, 33. H. 6. 54. b. cited to the contrary, and that the precedents warrant that. And the Court seemed to incline that in *misericordia* was good enough, and ordered the precedents to be searched, *et adjornatur*.

(a) See 2. Saund. 191, 192. But by 16. and 17. *Car. 2. c. 8. §. 1.* no judgment after verdict, confession by *cognovit actionem*, or *reliâtâ verificatione* shall be reversed for want of a *misericordia* or *capiatur*, or by reason that a *capiatur* is entered for a *misericordia*, or a

misericordia entered where a *capiatur* ought to have been entered. And by 5. *W. and M. c. 12.* the *capias pro fine* is taken away in all actions of trespass, ejectment, assault, and false imprisonment, in the courts at *Westminster*.

Stringe-

Stringefellow against Brownesoppe.

Until the *liberate*, lands extended upon a statute staple are not in the conusees, and the sheriff is bound to return them to a writ of the king's prerogative, claiming them to discharge a debt due to him from the conusor.

41. E. 3. Execution, 58. Hob. 339.
2. Rol. Ab. 158.
Godb. 316. 3. Leon. 158. Roll. Continuance, 302.
N. B. 28. b.

24. E. 3. 46. 3. H. 6. Det. 4.

1. Cro. 149.
45. E. 3. Decies tantum, 12.

(20) ONE *Stringefellow* sued a writ of *extendi facias* out of chancery to have execution of a statute staple against *Brownesoppe* directed to the sheriff of *Berks*, who made extent of the lands of *Brownesoppe*, and took his goods accordingly, and seized them into the hands of the king according to the writ, but did not make livery; and afterwards a writ of the king's prerogative issued out of the exchequer reciting the prerogative which the king ought to have to be first served and paid by his debtors, and commanded the sheriff to levy the debt to the king which the said *Brownesoppe* owed him, s. one hundred pounds of the goods of the debtor; and if he have not sufficient, then to extend his land; and this writ was delivered to the sheriff after the day of the return of the first writ, but the first writ was not returned at the day: and the sheriff returned this special matter upon the writ of the exchequer, and that he had returned the writ into the chancery served as above: and averred in his return that the debtor had no goods or lands to be extended, besides the goods and chattels, lands and tenements above extended, and therefore as to the further execution of that writ he had done nothing. (21) And it was holden in the exchequer for law, that the sheriff should be amerced if he would not amend his return, namely, return the extent into the exchequer for the service of the king's debt; and JUSTICE HALES and BROMELEY were of the same opinion, because the property of the goods and land was not in *Stringefellow* before they were delivered to

(20) *Infra*, 328. pl. 9. 22. E. 4. 10, 11. In trespass that beasts let for years cannot be taken in execution for a debt of the lessor, upon a recovery against him. Br. *Execution*, 107. Unless it be in the case of the king, by BRIAN.

6. *Jac.* ♣ In the case of the *Earl of Lincoln* the barons of the exchequer agreed to this case. See *infra*, 99. a. The sheriff extended lands upon a statute merchant, and returned the writ, but did not return that he had made delivery to the conusee, execution shall cease until the debt of the king be levied. 24. *Eliz.* Note by MANWOOD, Chief Baron. The course of the exchequer is, if a man be in debt to the king by recognizance or otherwise, his heir shall not be charged if the executor hath assets: and the feeoffee who comes in by purchase shall not be charged if the heir or executor have assets, for the heir and executor come to the land *gratis*, and therefore with reason ought to be charged. 7. H. 4. 34. 3. Co. 12, 13. Plow. Com. 440. a. 40. *Eliz.* B. R. *Charter and Peeter*. [Cro. *Eliz.* 597.] The sheriff took goods in execution upon a *feri facias*, but before selling them the defendant brought error, and had a *superfedeas* to the sheriff to stay execution if it were not in any sort done; and notwithstanding, a *venditioni exponas* was awarded, for execution was in some sort made. See Moor's Rep. 542. [1. Term Rep. 730.]

17. *Jac.* C. B. ♣ *Shelton's* case. Execution was awarded upon a debt. The sheriff, by a *feri facias*, took the goods of the defendant, and before sale the defendant brought error, and delivered a *superfedeas* to the sheriff. PER CURIAM, The defendant shall have his goods, for before the sale the property continues in him.

him

him by the writ of *liberate*. Therefore *quere*, because it was against the opinion of many in the *Temple*; for they were seized into the king's hands to be delivered to the party, and so they are in the custody and consideration of the law, and privileged from all other executions.—S. P. East. 3. *Eliz.* [Post. 197. pl. 44.]

21. H. 6. 5. a. 3. Co.
72. b. 13. R. 2.
Pledges, 31. 12. R. 2.
Distress. Statham, 3.
Dyer, 160, 1.
[Hardr. 23. Perk.
112. 2. Bl. Rep. 1294.
4. Term Rep. 402.]

* Hilary Term, 4. and 5. Edw. 6.

* [68. a.]

(22) **T**ENANT in tail enfeoffed his son and heir apparent, being within age, with his wife, and died; the heir entered, and died during the life of the wife; his issue may enter, for that is a remitter notwithstanding the wife. And see this pleaded in a formedon, *T. 37. H. 6. Rot. 365.* Yet *quere*, for the benefit of the wife.

If tenant in tail enfeoff
his heir within age, and
his wife, and die, and
the heir also die, living
the wife, his issue is
remitted.

11. H. 7. 12. Dier,
10. b. Litt. p. 665.
676. 6. 12. H. 4. 4.
1. 9. E. 4. 3. 7. b.
3. H. 6. 19. 29. 35.
40. 43. 44. Aff. 8. 69.
12. and 15. 7. 3. 2. F.
Remitter, 11, 12. 14.
38, 39, 40. 1. E. 3.
24. 30. and 34. 43. and
46. 2. B. N. C. 175.
44. E. 3. 17. 3. 6. E. 3.
Cui in vita, 20.
[Co. Lit. 351. b. Lit.
§. 663.]

Kidwelley against Brande.

(23) **I**N trespass between *Kidwelley* and *Brande*, where the defendant had pleaded not guilty, the case was, That the Abbot of *Hyde* and his convent made a lease for a term of years of a farm called *Lomer*, reserving rent annually to be paid at *Hyde* aforesaid, and if it should happen that the said rent be in arrear, &c. for forty days next after the Feast, &c. a clause of re-entry reserved to the Abbot and his successors. And *Kidwelley* had purchased the reversion of the king, which came to the hands of the king by the dissolution of the house of *Hyde*. And by the statute 32. *H. 8.* [c. 34.] he entered for rent arrear without making any demand of the rent at the farm, or at the site of *Hyde*, but on the last day of the said forty days he sent his servant to the farm to demand the rent aforesaid, and he was there from sun-rise to sun-set to seek the rent, but no one was there to pay it, and also on the same day he himself came to *Hyde* aforesaid, to seek, &c. about the tenth hour, and there was no one to pay it; he therefore required one *Bethell*

Lease of abbey lands
reserving an ancient
rent, to be paid at a
place out of the land,
with a clause of re-
entry; the king's re-
versioner may enter
under 32. H. 8. c. 34.
for non-payment, and a
demand of the rent is
not necessary. *A fortiori*,
where the clause
of re-entry upon such
default is, that he shall
enter without further de-
mand.

Plow. 69. b. S. C.
entered this Term,
Roll 355. 1. Bullt.
93. Ow. 2. 41.
Raft. Condition, 1.
4. Co. 73. 2.

to stay there all the day, and if any came thither to pay, that he should receive it for him; and so he did, but none came to pay. (24.) And all this matter was found by special verdict by the advice of the Judges of *nisi prius* at *Winchester* for the discretion and advisement of the Court, Whether the defendant upon this matter was guilty or not? and if, &c. then they assessed damages, &c. And this special verdict was entered upon the *poslea* (the which I myself tried). And the Court considered until this Term, Whether *Kidwelly* ought to have made a demand in this case, or not? And by the opinion of the Court, he needs not in this case make any demand, because * the rent was payable out of the land. (25) But *HALES* held, that where the demand is to be made by the law, it is not sufficient for the party to come to the place to seek the rent, but he ought to bring witnesses with him, and there in the presence of them he ought to make an express demand of the rent upon the land, although no person be there present to pay the rent; for the entry in such case is, that he came to the land, and was there to ask for the rent, or that he there demanded payment of the aforesaid rent, &c. *Quare hoc*. But in the case above judgment was given this Term for the plaintiff.

[Vide ante, 51. b. pl. 18. and the books cited in the margin.]

* [68. b.]

24. E. 3. 65. 4. and 5.
Co. 75. 56 Dier, 222.
a. 329. a.

Flow. 79. Dier, 109.

[1. Bac. Ab. 417.
But now see stat. 4.
Geo. 2. c. 28. §. 2.]

Dier, 88. a.

Newdigate's Case.

(26) And a like case was upon evidence to the jury in *B. R.* this Term in *ejectione firmæ* between *Newdigate* and others for a re-entry made upon a farm which was parcel of the possessions of the late priory of *Saint John's of Jerusalem*, where the rent was reserved to be paid to their treasurer of *Clerkenwell*; but there the words were besides, "that if it should happen the aforesaid rent to be arrear, &c. for the space of three months after any Feast, &c. then it should well be lawful for the aforesaid prior and his successors without further demand to re-enter, &c." (27) And by reason of this clause *Newdigate*, by virtue of the aforesaid statute of 32. entered and made a lease to the plaintiff in the *ejectione firmæ*, and without any demand made, and it was admitted. But *JUSTICE PORTMAN* doubted of the law in the case. And *quare*, if the possessions of *Saint John* are within the purview of the said statute, because it was dissolved in the same year by statute.

33. H. 8. 51. b.

Dier, 7.

Easter Term,

5. Edw. 6.

Thomas Buckler's Cafe.

* [69. a.]

(28) **I**N *B. R.* a man was indicted for murder, and the indictment ran thus, "*for that he, on such a day and year, at C. in and upon the aforesaid B. (who was murdered) made an assault, and him with a certain pocket-knife of the value of, &c. the aforesaid B. feloniously struck, killed, and murdered;*" without saying more, *s. of malice aforethought*, or without shewing in certain the place where the murder was committed, or such words "*ad tunc et ibidem.*" And for want of a venue* the indictment was thought void, because the assault might have been in one place, and the murder in another, for they are of divers natures; but not so for the other cause, *s. "of malice aforethought;"* for *murdered* necessarily implies that, as *robbed* means *feloniously took*.

(29) It was also clearly holden, that justices of the peace have an authority to enquire of murder, because that is felony, contrary to the opinion of Mr. FITZHERBERT. Note, that the case above was the case of one *Thomas Buckler*; who was outlawed upon the said indictment, and error was assigned therein by reason of the defaults above.

And another error was also assigned, for that the indictment was thus: "*Berks: An inquest taken there on such a day and year before, &c.*" without shewing any place where the inquest was taken; and, for these errors, the outlawry was reversed in the next *Michaelmas Term*. See in rescue returned by the sheriff upon a *capias* served without shewing the place where the rescue was made, although the place be shewn in certain where he took the body, 10. E. 4. [called *M. 49. H. 6.*] fol. 15. [a. pl. 14.] and it was reversed.

9. 6. 11. 12. H. 7. 5. 10. 25. Cro. 33. 98. 22. E. 4. 12. L. 5to. E. 4. 110. 38. Aff. 11. 12. 3. H. 7. 12. 3. H. 6. Attachment. [a. Hawk. P. C. 334. Cro. Jac. 345.]

This case was denied to be law, *H. 33. Eliz.* by the Judges of *B. R.* in the argument of the indictment of *Faux*. [4. Co. 44. b. See 1. Term Rep. 65. 69.]

An indictment for assaulting *A.* at *D.* and murdering him, without stating a place of the murder, or saying, *ad tunc et ibidem*, is bad.

[2. Hawk. 335, 336. See Str. 901. and Rex v. Mathews, 5. Term Rep. .]

So where it ran thus, "*Berks, An inquest there taken on such a day,*" &c. without saying any place where the inquest was taken, is bad.

The word "*murdered*" implies malice aforethought, 2. H. H. P. C. 187. 2. Hawk. 323. *cont.* Justices of the peace may enquire of murder, because it is a felony, 1. H. H. P. C. 45.

Words shall be supplied by intendment; but in an indictment, where the life of a man is in question, no such construction.

Stamf. 130. Cro. 89. 2. H. 7. 10. b. 26. H. 8. 1. a. 4. 43. E. 3. 13. 3. 2. 3. 5. 14. H. 7. 7. b. 1. a. & 5. b. 3. b. & 17. 8. 2. Jac. Cro. 41. 11. H. 4. 13. 6. R. 2. Endictment, 26. Dy. 261. 304. 4. Co. 41. Cro. 16. 13. E. 4. 10. 9. E. 4. 26. b. 2. Eliz. 183. b. 1. Bull. 95. 177. 2. H. 4. 19. 1. H. 6. 1. 2. Cro. 91. Dier, 50. 208. 2. R. 3.

A lease for years, or grant of a rent-charge by a parson, to commence after his death, confirmed by the patron and ordinary, shall bind the successor.

4. Leon. 151. 1. Inst. 341. Dy. 187. a. 244. a. Litt. 145. a. 26. Aff. 38. Hob. 7. 21. H. 7. 1. b. 10. Eliz. 279. a. [3. Bac. Ab. 334. & see the whole sect. (E) in Buc. Ab. Tit. Leases.]

(30) **A** PARSON makes a lease of his glebe for a term of years, the term to commence after his death; or makes a grant of a rent charge, in like manner, and the patron and ordinary confirm it; it was moved in the Bench, Whether the successor should be bound by this charge? And it was thought, that he should be bound, because it is a grant and charge immediately, although it did not take effect in the life of the grantor: but MONTAGUE doubted of the case.

(30) 44. *Eliz. B. R.* This case was urged and affirmed to be good law by GAWDY, Justice; and the other Judges in a manner affirmed it.

Of three brothers, if the second be murdered, the eldest also dying within the year, and not having brought any appeal, Whether the youngest may have it?

8. H. 7. 6. Cro. No. Pl. 65. Stam. Lett. 59. 17. E. 4. 1. 13. H. 4. 6. 9. 16. H. 7. 5. 15. b. 20. H. 6. 43. b. 11. H. 4. 11. b. Pulton, fol. 151. § 10.

Bell *against* Crakenthorpe and Others.

(31) **I**N appeal by *Bell against Crakenthorpe and others*, the case was: There were three brothers, and the second brother was killed; the eldest died within the year, not having commenced an appeal; Whether the youngest brother shall have appeal? was demurred (a).

(a) If the heir die pending an appeal commenced by him, it seems agreed, that no other heir can proceed in such appeal, or commence a new one. And it seems the stronger opinion, that if the right of bringing an appeal be once vested in an heir, who dies without bringing any, the right to the ap-

peal is gone for ever. And if an heir die, after judgment given against the appellant, it is questionable, whether his heir can sue out execution. 2. Hawk. Pl. Cor. 244, 245. See Vin. Ab. Appeal (B). Com. Dig. Appeal (A 1).

Wikes and Others *against* Bullocke and Others.

A fine came *cro.* &c. levied by a man and his wife to three, who grant, and render back an estate tail to the wife, remainder to themselves in tail, upon the death of the wife without issue, a *scire facias* brought to execute the remainder in tail.

Post. 199. Kel. 120.

(32) **A** FINE was levied in *Easter Term, 29. H. 8.* upon a writ of covenant brought by three men and their wives, who were sisters, against a fourth and his wife, who was sister to the other woman, and co-heirs of one *Harewell*, by which fine the defendants acknowledged the tenements to be the right of one of the sisters plaintiffs, as those which the husband and she, and the two other men and their wives, had of the gift of the conufors, and besides this, a release accordingly: and the conusees granted and rendered back

back the tenements to the said wife of the conusor in tail, to hold * of the chief lord by due services : and if it should happen that she die without issue of her body, &c. that then after her death the aforesaid tenements should remain wholly to the said three wives of the conusees, and the heirs of their bodies lawfully begotten, to hold, &c. remainder over to the right heirs of *T. Harewell*, deceased. (33) The wife who was donee in tail under the grant and render, died without issue ; and the three other sisters, and their husbands, brought *scire facias* to have execution of the said remainder in tail to them as aforesaid ; and the writ was to shew cause why the aforesaid tenements, after the death of the aforesaid *Elizabeth*, should not remain to the aforesaid husbands and their wives as in right of their wives, according to the form of the fine aforesaid, because the aforesaid *Elizabeth* is dead without issue of her body, &c. (a)

9. H. 7. 3.

1. H. 5. 8, 9. Dyer, 159. 41, 42, 43. E. 3. 24. b. 5. a. 12. b. 14. H. 4. 31, 32. 2. H. 5. 4. b.

Perk. 704, 705.

1. 5. H. 5. 10. 13. 3. 5. H. 6. 10. 19. E. 3. F. Fines, 47.

(a) They clearly could not support this *scire facias* for the remainder. They had by the fine *come ceo* an estate in fee simple executed in them, and the reservation of a less estate consequently was void. And all the cases hold, that no *scire facias* can be brought for the only estate which they have under the fine ; which being a reversion in fee, their proper remedy for the recovery of it was formedon in the reverter. See fol. 199. pl. 56. post.

(34) TWO men acknowledged the tenements to be the right of *I. S.* as those which the said *I. S.* and *A.* his wife had of their gift : and, upon the same fine, the husband and wife granted and rendered the said tenements to the conusors, for the term of their lives, to hold of the said *I. S.* and *A.* his wife, and to the heirs of their bodies, &c. by certain services and rents ; and after the decease of the said conusors, the aforesaid tenements wholly to revert to the said *I. S.* and *A.* his wife, and to their heirs ; and if it happen, &c. that then they should revert to the right heirs of the said *I. S.* for ever. And one, as heir of the bodies of *I. S.* and *A.* brought a *scire facias*, which was, "*Et quæ post mortem, &c.* ought to remain to him," &c. And upon good consideration, the writ was abated. And see 42, 43. E. 3. [5. a. 12. b.] for such a fine.

A fine come ceo, &c. levied to *I. S.* who grants back to the conusors for life, with the reversion to himself in tail, &c. The issue brought a *scire facias* for the tenements, "which after the death, &c. ought to remain to him," and bad.

Ante, pl. 32, 33.

1. H. 5. 8. b. 14. H. 4. 31. a. 2. Co. 91. 156. 3. 2. 199. a. 237. 41. E. 3. 24. b. Bro. Estate, 23. 66. Finch. Fines, 47.

Tenant in ancient demesne may vouch into the county, if the vouchee have nothing to be summoned by within the feignory.

2. Inst. 325. b. E. 15.
H. 8. Rot. 343. 27.
H. 6. 12. 35. E. 3.
Voucher, 31. b. 49.
E. 3. 21. b. 18. H. 8.
1. b. 41. E. 3. 31. b.

[F. N. B. 29. 30.
Booth. Real Act. 56, 57.]

(35) **A** TENANT in *ancient demesne* vouched one at the common law, in the same county, because he had nothing to be summoned within, &c. and there was a demurrer upon the voucher; and at length the voucher was adjudged: wherefore a day was given to the parties in the Bench to determine the warranty; and there, a *summon' ad warrant'* was awarded against the vouchee in a foreign county; and he came, and *gratis* entered into the warranty, and vouched over into another foreign county, and was received to it; and he came and vouched over into another foreign county, which was also received: and this plea was commenced in the court of LEWIS POLLARDE, *Justice*.

* [70. a.]

Feoffment to two, upon condition to make back an estate for life to the feoffor, remainder in fee to a stranger, and only one made back the estate, this is good for a moiety.

Fulb. Paral. lib. 2. fol. 73. Rol. Contin. 473.
49. E. 3. 16. b. 35.
Aff. 11. 15. E. 4. 6. a. 33.
H. 8. 46. a. Dyer, 56. a. 334.
[Shep. Touch. 139.]

(36) **A** MAN enfeoffed two upon condition, that the feoffees before a certain day should make back the estate to the feoffor for life, remainder over in fee * to a stranger. One of the feoffees accordingly made the estate, and the question was, Whether this be good for the moiety, because the condition is entire? And many thought that this was good for the moiety, because the party to the condition had dispensed with the condition by the acceptance of the estate.

Trinity Term,

6. Edw. 6.

Withers against Iseham.

A man cannot prescribe as keeper of a park without stating it to be an ancient park. But whether he may prescribe at all in himself and his predecessors, by reason of his office, which is only for life? *22.*

Litt. 73.
Noy. 120.

(37) **T**RESPASS was brought by *Lawrence Withers* against *William Iseham*, for breaking and entering his park, called *Ile Brewer's Park*, and the grass, &c. depasturing with ten hogs, &c. and breaking down and entering four acres of meadow, and the grass, &c. cutting down and mowing, and the hay thereof coming, *s.* seven cartloads of hay, of the value of, &c. taking and carrying away, and converting

verting and disposing thereof to his own use; and with his feet, in walking, treading down the grass there growing, &c.

(38) The defendant, as to the breaking and entering into the park, pleaded, that one *J. Arundel, Knight*, before the trespass, was seised in fee; and, by his deed, &c. granted the office of keeper of the said park to him, for the term of his life, together with all fees, emoluments, profits, and commodities to the said office appertaining, due, accustomed, or belonging; by virtue of which gift, the said defendant was possessed of the said office (whereas he should have said "seised"); and gave colour to the plaintiff. And as to the consuming and destroying the said grass in the park with ten hogs, he said, That before the time of the trespass, one *J. Arundel, Knight*, was seised of the said park, &c. and by his deed, bearing date the 29th day of *August*, in the year, &c. granted to him the office of keeper of the said park, with all, &c. as in the said writing more fully appears. And further he said, *that he and all his predecessors, keepers of the said park for the time being*, from time immemorial, have used, and had, and have been accustomed to have, common of pasture for all their hogs in the park aforesaid, at all times of the year, throughout the year, as appurtenant to the said office; by virtue of which, &c. he justified the trespass, and gave colour to the plaintiff *ut supra*. And as * to the meadow and hay, he pleads as above, by virtue of the grant of an office, &c. from one *Sir J. Arundel*, as in the said writing more fully appears. And further says, *that he and all his predecessors ut supra*, when the grass was ripe to be mowed, have been used to mow, &c. and to make hay, and to carry it off, and convert, &c. by virtue of which gift, he entered and mowed, &c. and did not say, that he was seised of the said office before the time that he made the prescription. And upon this, the plaintiff demurred in law. (39) And it seemed,

Fulb. 16 a. by grant of
it, the land passes.

46. E. 3. 18.

* [70. b.]

Litt. 3. a. 33. b.
12. H. 8. 10. 5. Co.
124. b.

(39) E. 8. *Jac. Sir Edward Dymock's Case*, [Lane, 31. 35. 61.] a certain writing indented was mentioned in an information; the defendant pleaded, that well and true it was there was such a writing indented, and agreed in all particulars; and it was adjudged good, by reason of the "*well and true it is*."

38. *Eliz. Rot. 1302. Man v. Curtsife*, the jury found, that one *John French* was seised, and did not find that *the within named J. F.* was seised; and bad, by *Nov*, in the argument of the case of *Bold* against *Walters* in error, 8. *Jac. B. R. (a)*

(a) By the record of *Marche v. Curtis*, which is the *Man v. Curtsife* of this note, Co. Ent. 215. b. the verdict is *quidam French*, as here said; but *MOOR, CROKE, NOY, ANDERSON, COKE, and BROWNLOW*, who re-

port the case, take no notice of that point. And *Bold and Walters*, *Noy*, 70. though itself to the point, is but a short note, and does not mention that case.

Bridg. Rep. 100. R.
500. 9. H. 6. 16, 17.
1. H. 7. 19. F. Bro.
291. 8. Co. 57. 5.
E. 4. 11. b. 18. E. 3.
17. 49. 31. H. 6. 34.
Perk. 23. 7. Co. 26.
Dy. 283.
9. H. 6. 36. a. 37.
H. 6. 34. a. 25. Aff.
8. 9. E. 4. 3.
[Co. Lit. 122. a. 1.
Ld. Raym. 119.]

39. 40. Aff. 6. 27. &
49. 9. 18, 19. 32, 33.
Hl. 6. 23. a. 11. b.
34. a. 5. b. 5. a. 34.
35. H. 6. 6. a. 25.
10. Co. 59. b. 22. H. 6.
Prescription, 47. 20.
E. 4. 54. 3. Bulst. 334.
335. 11. Aff. 23.
[Hob. 44. 45.]

21. H. 7. 15. 1. Keb.
270. Dav. 45. b. Co.
Litt. 122. b.

Hob. 42.

21. H. 7. 15. a.
[Co. Lit. 122. a. Mr.
Harg. note (1). Wat.
Cl. Law, 60.]
Finch, fol. 28.

* [71. a.]

27. E. 3. 84. b.

that the form and mode of pleading is bad in many particulars: 1st, For that he says he was *possessed* of the office, when he had a freehold in it, and not a chattel; wherefore, &c. Another, Because he did not convey the office to himself by one and the same person, but by divers grantors, and this is not good, but contradictory; for his plea is, "*that one J. Arundel*," in every justification, and that shall be intended several persons; wherefore, &c. Also, He claims common appurtenant for hogs; which is ill, for they are not commonable cattle, nor are goats. He ought likewise to have alleged before his prescription, that he had been seised of the office; for otherwise he hath not enabled himself to prescribe in himself and his predecessors. (40) And so it ought to have been alleged before the prescription, that *Illebrewer's Park, &c.* was an *ancient park*, to induce him to have the prescription, as an ancient city, or an ancient borough, and then to make his prescription. And then as to the matter in law, *s.* Whether a keeper of a park for life may prescribe in himself and his predecessors *at supra*, to have such profits appurtenant, or incidental to his office, or not? it seemed, that he is not able to make such prescription, for he hath not any interest in the office in perpetuity, nor was there ever any estate of inheritance in this office, nor a perpetual succession of it created. (41) And the office of a park-keeper is not of necessity, by law, as a bishop or parson of a church is; for it is a voluntary thing to appoint a keeper, since the lord of the park may be his own keeper if he please; and so can he not of other offices of stewardship or bailiwick, &c. And it seemed, that a man cannot prescribe in a profit appendant to a thing, unless the principal thing may have and hath a perpetual continuance and duration; and that is the reason, that an advowson appendant to a manor cannot be made appendant to the rent or service of the manor, but only to the demesne. (42) Also, no man can prescribe, unless he can say, that he and * his ancestors, or his predecessors, and all those whose estate he hath, &c. and here the defendant cannot have the estate of any one, for he must have his estate always at every change, by the death of the officer, from the lord of the park, by a new

(41) Note, It was ruled in *C. B.* in 32. *Eliz.* in *Hamlington's Case*, That a feoffment of a manor, &c. and livery made, although the tenants do not attorn, yet the advowson passes as appendant to the demesne; and this was also agreed 30. *Eliz.* in the same court.

grant

grant and deed; and therefore he shall never prescribe: and, for that reason, it is observable in our Books, that a tenant at will, or for years, or life, cannot prescribe in their own names to have common, from the weakness of their estates, but ought to prescribe in the name of the lord, as appears from *Chaworth's Case*, 9. H. 6. [62.] and 18. E. 4. 3. b. where this diversity is taken, s. The Inhabitants of a town, being tenants at will, could not prescribe to have common in the waste, &c. because, in their persons, there is no such ability or capacity, without being a corporation; but they may prescribe for a way to church, or to grind toll free, &c. which are only easements; but to prescribe in such form, in the vill or place, s. that within the vill of D. there is such an usage or custom, that every inhabitant shall have common, or such other thing, that may be good, because it refers to the place, and not to the person of the prescriber.

(43) And so the defendant ought to have done here, s. that there is such an usage and custom at *Ils-brewer's*, or in the county of *Somerset*, that every keeper, &c. shall have such profit by reason of his office, &c. And I will readily agree, that land, or any other annual profit real, may be incidental, and appendant to an office, and by the grant of the office the land shall pass; as to the office of warden of the Fleet, or of the forest of F. as appears in 1. H. 7. [29. a.] But then the offices are offices of inheritance; for, otherwise, one great inconvenience would arise, s. that a freehold would be suspended; for, after the death of the officer, the freehold of the land, or of the profit, would be in abeyance, until a new officer be made or created, if the office did not descend to an heir, or to a man who had a perpetual successor by the common law, or by the king's letters patent: and in no case, except only in the case of the parson of a church, can a freehold be in abeyance, &c. (44) And, in this case, the hay, or common for the hogs, is freehold, and affize lies for it, as for a profit in a certain place to be taken; as vesture, or the first mowing of a meadow, is freehold, and affize lies for it. And it is not like the prescription which the Chief Justice of the Bench makes in granting his offices, although * he hath, in his office of Judge, only an estate during the king's pleasure (a); for his prescription runs generally, s. that it

1. Bult. 94.
17. H. 7. 16. Co. Litt.
113. B. 32. H. 6. 5. b.
4. Co. 32.
22. H. 6. 37. 17. 9. 15.
E. 4. 26. 3. 29. a. 18.
H. 8. 1. b. 6. Co. 60. a.
Cro. 197. 8. 18. 20.
E. 4. 23. 1. 10. b. 21.
H. 7. 15. a. Pres-
cription, 3. 16. Dyer,
363. 4. Co. 32. a.

4. E. 4. 23. 7. H. 4.
24. 6. Co. 60, 61.
B. N. C. 455. 10. Co.
59. b. 2. Keble, 518.
[Cro. Jac. 152. 1. Ld.
Raym. 405. 2. Wils.
258.]

Co. Litt. 232. .
Cro. Jac. 605.
1. Rol. Ab. 230. B. 8.
1. 8. 12. H. 7. 29. 4.
17. a. Plow. 162. a.
169. a. Davis, 34. a.
11. Aff. 23.

Dyer, 190. b. 281. b.
Litt. fol. 144. a.

[Co. Lit. 341. a. Gilb.
Ten. 105, 106. 2.
Black. Com. 107.]

Wt. 2. c. 25. 5. 21.
H. 7. 10. b. 37. a. 9.
37. H. 6. 52. a. 36. b.
17. E. 4. 6. Dyer,
114. b. 285. N. B. 173.
F. Fulb. fol. 71.

* [71. b.]

(a) By 12. & 13. W. 3. c. 2. the Judges now | *serint*, and that by 1. G. 3. c. 23. notwithstanding
hold their commissions *quoadmō bene se gef-* | ing the demise of the crown.

6. Co. 61. 12. 21. H.
7. 16. b. 17. a. 20.
H. 6. 8. b. 20. 22.
E. 4. 18. 18. Plow.
169. a.
Dyer, 24. 114. 147. 154.
Cro. 47.
[4. Com. Dig. 466.
Barnes, 371. 2. Mod.
256. 2. Wils. 232.]

12. H. 7. 18. 10. Co.
59. 42. E. 3. 5. a.
Cro. 80. 32. H. 6. 5.
21. H. 7. 13. a.

32. H. 6. 5. 20. H. 6.
8. Prescription, 7. 4.
Co. 32. Hob. 45. 118.
10. Co. 59.

[4. Com. Dig. 471, 472.]

Dyer, 216. a. B. N. C.
159. Co. Litt. 233. b.
Bro. Grants, 134.
Cro. Car. 60.
18. E. 4. 9. a. Rolle,
Continuance, 357. 1.
Bull. 94.

hath been used, &c. that every Chief Justice, &c. for the time being, should grant such an office, &c. and not to prescribe in his person and that of his predecessors, &c. (45) As in 11. E. 4. [2. b.] where SERJEANT JENNEY, being impleaded in the Bench by bill, said, that he was a serjeant, and that all serjeants of the law have been impleaded in all times, &c. by original writ, and not by bill; there he did not prescribe in his predecessors, &c. The law is the same by prescription of the under-sheriff, to take of every prisoner acquitted of felony twenty-pence for bar fees in 21. H. 7. [16. b. 17. a.] (46) And there in another case, [21. H. 7. 15. b. 16. a.] where the lord of a manor prescribed to have an heriot after the death of every tenant for life, this is holden good for the generalty; for although the estate be determinable, yet may there be many other estates for life which have duration: but there it is holden by the other side, that tenant for life can never make prescription, for want of perpetuity in his estate. And in *Hilary Term*, 6th and 7th, judgment was given for the plaintiff for the insufficiency of the plea; and chiefly for this, that it was not alleged that the park was *an ancient park*, s. from time whereof, &c. But as to the matter in law, they were not clear with the plaintiff, but rather against him, though they did not argue it. (47) But afterwards *T. 1. Mar.* in the star-chamber, before Stephen bishop of *Winchester*, chancellor of *England*, Cuthbert bishop of *Durham*, and Thomas bishop of *Norwich*, and bishop of *Ely* elect as it is said, and many others of the council, and THOMAS BROMELEY, *Chief Justice*, and DAVID BROOKE, *Chief Baron*, it was decreed and ordered, that *Ischem* ought to be well recompensed for the profits and commodities appendant to his said office, although it was in a manner agreed by all, that it well lay with *Withers* to dispark the park, notwithstanding the grant of the office (a); but if the herbage had been expressly granted

(47) *M. 41. & 42. Eliz. C. B. Rot. 1849. Perkins v. Comberford*, [Cro. Eliz. 725.] in replevin, a custom of a manor in *Cheshire* was alleged to be, that if any one, although he be a stranger, die within that manor, the lord should have the best beast which he was possessed of within the manor at the time of his death, as an heriot; and resolved, That this was not a good custom to bind strangers. [Post. 199. b. 1. Bac. Ab. 673.]

(a) In the edit. of 1592 in the *Middle Temple Library* is a good note in a contemporary hand of a case also reported in Cro. Jac. 17. and Moor 786. which differing in

some respects, and being also more applicable to our case, I have thought not improper to transcribe: "Nota, que Mich. 4. Jacobi, in Camera Stellata, in casu inter

granted, then the owner might not plough the soil; &c. for they held, that if there be an ancient park, and the office of keeper usually granted with certain profits appendant to it, as windfalls, &c. these things should go with the office by prescription, and should be enjoyed by the keeper; and especially if the grant be such, *s. in as ample manner and form as such an one had, &c.*; because that is as large a grant as if it* had been expressed how much he should have; for it shall be referred to the profits which the other person had; which rests in profit. And at length, *Ifeham*, by arbitration, had two hundred marks for costs and damages, and forty marks *per annum* in annuity for all his interest and profit of the park.

Co. Litt. 253.

9. Co. 30. and 50.

4. Co. 18.

* [72. a.]

"Dām Ruffel et Comitē de Nottingham,
"pur divers riots supposez estre faits p' les
"servants del Count de Nottingham, etant
"grand admiral d'Engleterre, et un des
"s̄rs del counsaile, en debruiaunt ove force
"les portes ou wicket del castle de Doning-
"ton in com' Berk. dont la Dame Ruffel
"avoit la custodie, et l'herbage del park,
"pur sa vie, del done la Roigne Eliz. en la
"5. an de sa raigne; et linheritance del castle
"et parke fut apres p' m. la royne done al
"dit s̄r admiral; fut tenuz p' Sr. Edw.
"Coke, Ch. Justice del Com. Bank. q. le
"s̄r admiral et ses servants purroient bien
"justifier le debruier del gates forciblement
"pur ceo que la Dame Ruffel navoit nul
"posseſſ. per sa dit office mes a son oepe."
En m̄ la case Ruffel et Count de Nottingham
ceux points fueront resolvez:

"1. Ce'y que ad custodiam domus, caſtri,
"ou parci, nad aucun posseſſion a son oepe

"dēm mes solement come servant al oepe,
"ce'y que ad linheritance.

"2. Si tiel servant voile presumer den-
"garder le posseſſion encounter le owner,
"il poit justifier l'enfreindre del meason a
"sa pleasure; et ne sera account forceble
"entry.

"3. Si soit aucun lodge ou aucun cham-
"bers en le castle ou meason apperteignant
"al office del keeper, il ad interest in ceux
"solein't, et nemy en lentier castle, meason,
"ou parke; mes doit remove hors de ceo
"al pleasure del owner.

"4. Lowndr poit debruſer sa meason nient
"obstant q'il ad grant custodiam de ceo.
"Come auxi il poit dispartir son park une'
"q'il ad grant lherbage de ceo; come en le
"principal cas icy. Mes le grantee avera
"toutfoits le fee q' fut grant pro exercitio
"officii apres loſſice determin. Vide Sir
"Tho. Wroth's Caf. Plod." [452. & Cro.
Car. 60, 61.]

Michaelmas Term,

6. Edw. 6.

(1) MEM. That on the 19th day of May, in the year of Serjeants made.
Our Lord 1552, and in the sixth year of the reign 3. E. 4. 12.
of King Edward Sixth, I received the royal writ in these 18. E. 4. 11.
words: 9. H. 7. 23.

(1) M. 5. Ricb. 2. B. R. Rot. 3. The Lord the King sent to his faithful and beloved
ROBERT TRESSILIAN his writ close in these words: "RICARDUS, Dei gratiā, &c. di-
"lecto et fideli nostro ROBERTO TRESSILIAN salutem. Quia volumus quod vos fiat Capital'
"Justic' nostr' ad placita coram nobis tenenda, et omnia alia quae ad officium Capit' Justic'
"nostr'

Fortescue, *Commen.*
Leg. Ang. 117.

words: "EDWARDUS SEXTUS, *Dei gratiâ Angliæ, Franciæ, et Hiberniæ rex, fidei defensor, et in terrâ ecclesiæ Angliæ canæ et Hiberniæ supremum caput, dilecto sibi JACOBO DIER, armigero, salutem. Quia de advisamento concilii nostri ordinavimus vos ad statum et gradum Servientis ad legem in Quindena Sancti Michaelis Archangeli proximâ futurâ suscipiendum, vobis mandamus firmiter injungentes, quòd vos ad statum et gradum prædictum ad diem illum in formâ prædictâ suscipiendum, ordinetis et præparetis, et hoc sub pœnâ mille librarum nullatenus omittatis. Teste meipso apud Westmonasterium 19mo die Maii, anno regni nostri sexto."* At which day ROBERT BROOK, Recorder of the city of London, and I JAMES DYER of the Middle Temple, THOMAS GAWDY of the Inner Temple, WILLIAM STAMFORD and WILLIAM DALISON of Gray's Inn, and RALPH ROKEBY and RICHARD CATLINE of Lincoln's Inn, gave rings with this motto, *Plebs sine lege ruit.*

Whitfield made a serjeant, M. 10. Car.

"*nostri nomine nostro facienda, vobis mandamus quòd officio illo intendatis, et omnia et singula quæ ad officium Capital' Justit' nostri pertinent' faciatis et exequamini prout decet. Teste meipso apud Walbam 22. Junii, anno 5.*" † *Sey's Book*, b. fol. 118. a.

T. 13. Car. GLANVIL of Lincoln's Inn was made Serjeant, and gave rings with the motto, *Sol regis stirps legis virescit.*

T. 12. Car. was a general call of Serjeants, the solemnity of whose creation was deferred till Hilary Term ensuing on account of the plague in London, and they gave rings with the motto, *Rex animas legem.*

M. 7. Car. ROBERT HEATH, Knight, *Attorney General*, was made a Serjeant, and gave rings with the motto, *Lex regis vis legis*; and the following day, s. 26. *October*, was made Chief Justice of the Common Pleas.

M. 10. Car. SIR JOHN FINCH, *Attorney General*, was made Serjeant, and gave rings with the motto, *Rosæ et lilia dant purpura*; and the next day was made Chief Justice of the Common Pleas.

Brown against Sackville.

A will written out before the testator's death from notes taken from his mouth is good, tho' never read to him. (2) A MAN seised of lands in fee simple holden in socage (being sick in bed) sent for MR. ATKINS, a man learned in the law, and desired his counsel in making his will,

(1) *William v. Edmunds in ejedione firmæ*, M. 30. & 31. Eliz. or 38. & 39. Eliz. B. R. 261. [Cro. Eliz. 100.] A man by parol devised lands to his three daughters; his friends left him and reduced it to writing without any direction; and they interrogated the deviser if he would affirm his will, which was shewn to him, and he being acquainted with the effect answered that he would; and yet adjudged a void devise, because the writing was from the memories of the friends, and not the will of the testator. But by CLENCH, if the deviser order his will to be written, and die, and afterwards it be put into writing in convenient time, that is a good devise.

Sir Richard Pexal devised to his wife for her jointure certain land. The scrivener inserted a condition. *Sir Richard*, lying in bed, said, "that it was more than he intended." The devise was good, and the condition void, because it was countermanded by parol.

M. 3. Jac. B. R. in *Newdigat's Case*, by all the Judges, that the testator ought to order the writing of his will, otherwise it is void. Out of the Book of MR. MASON. There

will, who took notes of it, and afterwards departed from the devisor, and about eight of the clock in the morning put the said will in writing according to due form of law, agreeably to the said notes, and according to the said will declared unto him, which was wholly written before eleven o'clock of the same day, and the devisor died at twelve, so that he did not hear the said will read. *Ex depositione* M^r. ATKINS. It was moved, Whether this was a good will, or not? And by the opinion of the Court in the Bench in *Easter* Term, 4. & 5. Ph. & M. in a writ of *quibus* brought by *Brown* against *Sackville*, in evidence upon the trial of the issue *nul disseisin*, that such a will is good enough, and sufficient * by the statute. So the same point was doubted upon the last will of *Hinton* of *London* in the court of wards, M. 4. & 5. *Eliz.* whereof articles were made in the second year of E. 6. *ut supra*, and read to the devisor by the scrivener, and written at length after his death, and holden as above well enough (a).

4. Mar. Bendl. 61.
[Co. Ent. 224.] } S.C.
[Keilw. 209.]
1. And. 34.
Perk. 92. 2.

3. Co. 31. b.
34. H. 8. 53. 1.

Went. 10.

* [72. b.]

There also by COKE, *Attorney General*, the testator ought to be of disposing memory, and not only of reasonable memory.

T. 11. *Jac. C. B. & Caesar and Lake's Case*, adjudged, that if a man intends land to J. S. remainder to J. D. and before the remainder written the devisor dies, this is no devise within 32. H. 8. c. 1. according to some, because it depends upon the other; but if a devise of two acres, one to J. S. the other to J. D. and the devisor die before the devise to J. D. written, yet that is good within the statute for the acre to J. S. because there the one doth not depend upon the other.

(a) Now by 29. Car. 2. c. 3. § 5. all devises of lands and tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and

be subscribed in his presence by three or four credible witnesses, or else they shall be utterly void and of none effect. And see Dougl. 241.

(3) THE husband alone aliened his wife's land by a fine with proclamations, and died; the five years ex-

The wife is barred by a fine with proclamations levied of her lands by the husband alone,

(3) 43. *Eliz. Whetstone v. Wentworth*, [post. 159. 2. marg.] Tenant for life, remainder in fee to a married woman; the tenant for life levied a fine; the husband died; the wife married again, and the tenant died; five years passed, the husband died; the wife shall be barred, and has no remedy by the statute 32. H. 8. c. 28. And there a diversity was taken between warranty and right upon descent: as far as respects the warranty, that may be so private that the wife shall never know of it, and therefore cannot refer this to the disposal of the second husband; and therefore it is not reasonable that she shall be bound by the laches; otherwise it is of a right to the land which a wife hath knowledge of before, adjudged notwithstanding that the wife shall be barred.

Now, *Attorney General*, who cited the case before, cited this also, 4. & 5. *Eliz.* in a *memorand. Thefaur' Beaumont's Case* [2. Inst. 681. 9. Co. 138. b.] : A man seized of land in right of his wife, made a feoffment of it to the king, and the husband died; the wife may enter by statute 32. H. 8. c. 28. for notwithstanding there was no discontinuance, yet it may turn the estate to a right, and she may enter, first, because the act of parliament is general, and the king is not excepted; secondly, an act of parliament is a judgment, and after judgment may be an entry without shewing any right.

if she suffer five years to pass after his death without action or entry.

8. Co. 72. b. Co. Litt. 326. 5. Eliz. 224. 11. 2. 10. 11. Co. 93. 49. 62. 10, 11. Co. 99. 49. Raft. Leaves, 2. Plow. 373. 1. Rol. Rep. 91. 160.

[1. Cruise on Fines, &c. 211.]

pired after his death without action or entry on the part of the wife; she and her heirs shall be barred for ever by the opinion of the Court, notwithstanding the statute 32. H. 8. [c. 28.] which does not limit any time of entry, &c. But this does not toll the general law made by the statute 4. H. 7. [c. 24.] of Fines with Proclamations, and the statute of 32. speaks only of fines without proclamations.

A fine levied at common law of lands in ancient demesne of the nature of gavelkind, does not alter the course of inheritance.

[Dali. 12. S. C.]

(4) **L**ANDS in ancient demesne, which are divisible between heirs male, are aliened by a fine levied at common law; Whether by this the course of inheritance is altered, and made descendible to the heir at common law? *quære*; and it seemed by the better opinion that it is not.

40. 49. E. 3. 4. 17. 8. E. 4. 6. Davis, 36. b. Dier, 179. b. Plow. 379. 14. H. 4. 8. a. 49. E. 3. 8. Davis 31. a. Rol. Continuance, 63. 71. [Rob. on Gavelk. 72.]

A. the parson, made a lease for years duly confirmed; the patron having granted the next avoidance, the grantee's clerk at A.'s death hath the advowson discharged of the lease; but if he die during the term, Whether the next incumbent shall hold it discharged of the residue? *quæ*.

3. Mar. 133. a. 356.

B. leaves, 58.

7. H. 7. 6. b.

Moor, 481.

Co. Litt. 46. a.

[Cro. Car. 582. 7. Co.

8. Hob. 7. 3. Bac.

Ab. 386.]

(5) **T**HE parson of B. in the county of *Southampton*, made a lease of his rectory, for a term of sixty years, to one E. W. which was confirmed by the treasurer of the church of *York*, who was the patron as in right of his trusteeship, by his writing and seal; and the bishop of *Winchester* also, being ordinary, confirmed the said lease in the life-time of the lessor; and before the confirmation the treasurer had granted the next advowson to another for that turn; and then the lessor died. The grantee of the advowson presented his clerk, who was admitted and inducted; and then the said treasurer, with the assent of the bishop of *York* and the dean and chapter, aliened the patronage in fee to the duke of *Somerset*, who sold his interest to R. And now the incumbent who had avoided the lease of his predecessor died, and a new one is put in by R. Whether this incumbent should avoid the rest of the lease, or not? *quære*. And note, that the alienation was made after the death of the lessor; *ideo quære inde*.

(5) E. 41. Eliz. A patron grants the next avoidance to B. the parson makes a lease for years, which is confirmed by the patron and ordinary; the parson dies; B. presents: C. shall avoid this lease. & Plowd. 182. cons'. Co. Litt. 46. a. 7. Co. 8. a.

A parson made a lease for years, which is confirmed by the ordinary and by one patron, there being two patrons of that church; the parson died, the ordinary collated by lapse; and adjudged that this was well confirmed, and the collatee shall not avoid this lease. 7. 33. Eliz. B. R. *Lancaster v. Lucas* [1. Leon. 233.]. It was well argued, and at length.

Kemp's

Kempe's Case.

(6) **M**EMORANDUM, That for these words, s. "*William Kempe will within these two days be a bankrupt*," an action upon the case was brought in *B. R.* and a demurrer in law, and an argument whether it lies. *Quere.* And as I was informed, judgment was given in that case for the plaintiff. See Action upon the Case for words, s. "*A. B. is infected with such a robbery and murder, and doth smell of it.*" *M. 14. & 15. Eliz. post. 317. b.*

(6) *E. 2. Car. B. R. Hill's Case* [Latch. 114]. "*Hill is a base broken rascal, and hath broken twice already, and I will make him break the third time.*" It was moved in arrest of judgment, that this is not actionable, for it is not said that he is a bankrupt; also it is not said that he is a tradesman, but that he is an honest subject, and gains his living by buying and selling only. For this cause judgment was arrested.

T. 1. Car. B. R. Rot. 833. Dean and Steal's Case [Latch. 188.], the plaintiff declared, that for twenty years last past he had used the trade of shifting and dressing of wool, and that the defendant, to prejudice him in his trade, spake these words, "*Thou openest my pack, and dost put in wet wool*;" and *PER CURIAM* an action lies, because it is a deceit in trade. So of a silk-dyer, "*that he put pin-duff in his vat.*" *24. Eliz.* was a like case: *Sandford* being a great clothier, and making very excellent cloth, people gave more for his cloth marked with his mark; the defendant upon his had cloth put *Sandford's* mark, upon which he brought an action and recovered. So if one says of a fuller, "*that he stopped holes made in fulling with flock*," an action lies. These cases were cited by *DODDERIDGE* to have been so adjudged.

H. 3. Jac. B. R. Rot. 855. & Edmonds v. Whetstone. The plaintiff being a merchant, the defendant said of him, "*that he would prove that Mr. Edmonds had been a bankrupt, and had agreed with his creditors for a noble in .be pound.*" Adjudged actionable.

* [73. a.]

*(7) **A** WRIT of partition was brought upon the statute 32. *H. 8.* [c. 32.] and the partition confessed, whereupon it was awarded that *partition should be made*; upon which the writ issued to the sheriff to make partition equally, who returned, *partition made by twelve lawful men*: and one of the defendants was discontented at his share, because it was too small in value, and would have put in a surmise against the sheriff and his partial return, and prayed a new writ to make a more equal partition; and it was well argued whether he should have it or not. See *postea*.

Whether a new writ of partition can be awarded, if the shares be unequally distributed by the sheriff upon his former writ?

40. *E. 3.* 37. *Dy.* 52. 177. 278. 3. 7. 11, 12. *E. 4.* 21, 23. *b.* 4. 2. 3. 5. 7. 10. *H. 7.* 11. 27. 5. 28. & 29. *N. B.* 265. *b.* *Litt.* 248, 9. 20. *E. 3.* *F. Recovery in Value*, 4. 2. *Int.* 39. *b.*

[4. *Com. Dig.* 312, 313.]

(7) Note, That in 4. *Car.* it was so done in the case between *Taylor* and *Sir Penal Brockbursh*, and a new writ *de partitione faciendâ* was awarded.

W. Eppes against Dabbes.

(8) **T**HE late prior of *Canterbury*, with the assent of his convent, made a lease for twenty-one years in the 26th *Hen. 8.* to one *Marshe*; and afterwards the said *Marshe*,

Of a lease of abbey lands made within one year next before the statute of Dissolutions to

one who had another lease at the time of making it.

Plow. 106.

Dyer, 102.

Raft. Monasteries, 11.

Pal. 203.

on the 20th day of *September*, in the 30th of the said king, took a new lease of the prior and convent of the same land to him and to one *Culpepper* for a term of forty years from the Feast-day of *Saint Michael* the archangel then next following, upon which lease the ancient rent was reserved. *Marthe* and *Culpepper*, on the 20th of *October* then next ensuing, granted all their interest and term to one *Stephen Thorneherst*, and, he being in possession, the statute 31. *H. 8.* [c. 13.] for the dissolution of abbies, &c. was made; and afterwards, s. on the fifth day of *April*, in the said thirty-first year, the said priory and all their possessions were surrendered and given to the king by deed enrolled, sealed with their common seal; and afterwards *Thorneherst*, on the first day of *October*, in the thirty-second year, granted all his term and interest which he had, from the Feast of *Saint Michael* the archangel then next ensuing, to one *G. B.* by virtue whereof the said *G.* after the said Feast entered. And after that *King H. 8.* created a cathedral church at *Canterbury*, and a dean and chapter, and granted the reversion of the said land to them and their successors; and afterwards, s. on the sixteenth day of *December*, in the thirty-third year, the dean and chapter made a lease by indenture to the said *Thorneherst* for a term of fifty years, and then *B.* bargained and sold his interest and term to one *J. Eppes*, who made one *W. Eppes* his executor, and died; and the executor made a lease at will to the said *Eppes*, the present plaintiff, who entered and occupied the land with his beasts, and *Dabbes* distrained them as bailiff to *Thorneherst*, and made conuzance for *damage feasant* by virtue of the said lease made to *Thorneherst* by the dean and chapter in the 33d *H. 8.* and all the other matter was shewn in bar to the avowry; upon which the defendant demurred.

Adjudged, that such second lease for twenty-one years is good; but it is proper for the lessee to plead all this matter, and to shelter himself under the statute. Plowden, 106.

The King against Skrimshire.

Information grounded on a will " bequeathing the
" king to accept of my ma-
" nor of O. to him and
" his heirs for 500l. which
" I owe him, paying over

(9) *JOHN BOURCHIER* Lord B. late deputy of *Calais*, having feoffees to his use of the manor of *Offeley*, and others, in the county of *Stafford*, to the value of ninety-two pounds *per annum*, made his will, bearing date the third day

of

of March, in the year of Our Lord 1532, which was 23. Hen. 8. and died on the nineteenth day of the same month; the tenor of which will is * in this form: (10) "*In most humble manner I beseech the king's highness to be so good and gracious lord unto me, as for the five hundred pounds which I owe his grace, payable in five years, to accept, after the decease of my wife, the manors of Haughton, Offeley, and Doxsey, in the county of Stafford, to have and to hold the same to his highness and his heirs for ever, his grace paying for the same unto mine executors, over and above the said five hundred pounds, such sums of money as shall please his highness towards the performance of this my last will and testament, &c.*" (11) And afterwards, in the mean time, between the making of this will and his death, s. the 11th day of the same month, the feoffees, at the request of the said lord, enfeoffed others to his use, for the term of his life, remainder to one *Humphrey B.* who was his bastard, and to the heirs of his body begotten, remainder to the right heirs of the said lord. And the said *Catharine* his wife died on the 12th day of May, in the 27th H. 8. And after the statute 27. H. 8. [c. 10.] the said *Humphrey B.* for four hundred and twenty pounds bargained and sold the said manor of *Offeley* to *Skrimshire* in fee, and suffered a common recovery in a writ of entry in the *post* by several to the use of the said *Skrimshire*, in the 31st H. 8. and execution was had upon it accordingly, wherefore the said *Skrimshire* entered and took the profits; and now an information is brought for the king by the attorney general for an intrusion into the said manor of *O.* in this manner, (12) that is to say, "*Memo- randum, That whereas it is found in memorandum, &c. that John Bourchier, Knight, late lord B. by his last will dated as above, in consideration of five hundred pounds which the said John then owed to the lord Henry 8. late king of England, gave to the said late king and his heirs for ever, after the death of Catharine then his wife, his manor of O. &c. in the county aforesaid, the said late king paying for the same to the executors of the said John, over and*

"and above such sums as he shall please towards the performance of the will," excepted to, 1. Because no record is averred, and neither use nor possession in the king without record. 2. Stating a devise of the manor when he had only an use. 3. Acceptance of the king should be shewn. 4. Because the word "*paying*" is conditional, and no averment of any thing being paid by the king. 5. Because after the will the deviser made a fresh feoffment to his own use for life, remainder over; so there was a revocation of his will.

3. Co. 21. a.

Dy. 49. b. 224. a.

(12) *M. 29. Jac. R. R.* this case was put by HURTON, in the argument upon a great case where exception was taken by the attorney general to the verdict, That if a man justify in trespass by force of a devise which is traversed by the plaintiff, and the jury find the devise, and do not say whether the deviser be dead or not, that judgment shall be given; for the Judges ought to judge only upon the record, and in the record there does not appear sufficient matter for the defendant; and so it was agreed.

"above

Bridg. Rep. 97.
2. Rol. Rep. 68.

"above the said sum of five hundred pounds, as much as the said late king should please, as, &c. and because, &c." with an averment that the said J. B. and Catharine are dead, and that certain persons intruded, &c. To which information S. appeared upon process, and demanded oyer of the said will, and had it, and pleaded all this matter in bar, and concluded, judgment if the king ought to have the information, &c. without making any (a) averment of the life of the said Humphry B. or of his issue, &c. and to this plea the attorney general demurred in law.

* [74. a.]

* Exceptions taken to the Information.

1. 21. H. 7. 31. a. 19.
and 21. 5. 7. E. 4.
7. 16. 37. H. 6. 10.
b. Dy. 238. 355. Cro.
201. 35. E. 3. F.
Villanage, 22. 29.
H. 8. Bro. Fait Enrole,
16.

(13) *Imprimis, Non constat* how this will came in here, for it was not found by office, nor by any other matter of record; and if the Attorney General will make a suggestion for the king, to entitle him to any inheritance or freehold, as here, without matter of record to induce him to do that, it is void, &c. and then all the process made upon it is void, &c.

Dy. 117. 143. 354.
Perk. 104. 21. H. 7.
19. 1. Leon. 299.

(14) *Item*, The information is false, and cannot stand true by the law, s. that the lord B. gave by his last will the manor of O. because it was in use, and by the devise the freehold cannot pass, as by feoffment of a *cestuy que use* by the statute of [1.] Ric. [3. c. 1.] for a will made by a *cestuy que use* is not within the said statute. And also at the time of the making of the said will, lands and tenements were not deviseable by will by the common law of the land, unless they were put in feoffment, &c. or deviseable by custom; which ought to have been alleged here specially, &c.

6. Co. 76. a. Dr. and
Stu. 14.

(15) Also, No gift appears by the will, only an humble petition made to the king to accept of that in recompence for the debt, and whether the king like or dislike it, *non constat*; and because it is a thing dubious and indifferent, it

(13) A lease for years shall not be in the king by deed without inrollment, E. 8. Jac. Sir Edward Dimmock's Case [1. Roll. Ab. 163. Lane, 31. 35. 61.] in the exchequer; but by 37. H. 6. 10. b. chattels personal shall be. And Fitz. Joinder in Action, 3. An obligation made to the king is good.

(a) By 21. Jac. 1. c. 13. after verdict judgment shall not be staied or reversed for lack of any averment of any life or lives of

any person or persons, so as upon examination the said person be proved to be in life.

shall not be intended the one or the other until the pleasure and assent of the king be known and declared expressly, which is not alleged in the information, &c.

(16) *Item*, If it be taken for a gift and devise by this will, still it is conditional; for this word (*paying*) is conditional in a will, and something must be paid over and above the sum of five hundred pounds for the performance of the will, more or less. And this ought to have been alleged by the king; for it does not appear that one penny was paid in the life-time of king *Henry* 8. and then no use can vest in him, because it was a condition knit to the gift, &c.

(17) *Item*, No use can vest in the king by the will, or otherwise, without matter of record, any more than an inheritance or freehold, &c. *Item*, The will was rendered clearly void in law by the feoffment and alteration of the use made the said 11th day of *March*, which was between the making of the will and the death of the deviser, because a will or testament only takes effect after the death of the deviser or testator; and here this was revoked and annulled in the life-time of the testator, &c.

Co. Litt. 236. b. 10. Co. 41. 3. Co. 21. Dyer, 163. a. 317. 31. H. 8. B. N. C. 152. Cro. Car. 205.

[Swinb. on Wills, 149, 150. Sheph. Touchf. 401, 402. 2. Black. Rep. 1215.]

Plow. 213. b. 1. H. 7. 30. b. 37. H. 6. 10. b. 21. H. 7. 21. b. 40. 44. 50. Alf. 35, 36. 1. Plow. 553. 44. E. 3. 33. a. 2. R. 3. 3. b. 4. Mar. 143. b. 355. a. 49. E. 3. 5.

[Gilb. Devises, 98. 3. Atk. 741. 1. Wils. 308. 3. Wils. 6. 1. Br. Caf. Ch. 401. 2. Br. Caf. Ch. 291. 319. Shep. Touch. 394.]

(17) *E. 6. Jac. accord*; and *E. 7. Jac.* agreed by the Barons of the exchequer, between the *Earl of Lincoln* and *Sir Edward Dimmock*. [See note (13) *supra*.]

* [74. b.]

(18) **A** TERMOR of a parsonage devised his entire lease, term, and interest to another, *provided, if it should happen that the devisee die in the life-time of I. S. that then the said lease, term, and * interest, should remain entire to the said I. S. during the residue of the term of the lease*; the devisee sold the term entire, and died in the life-time of *I. S.*; Whether *I. S.* hath any remedy for the term, or not? And LORD MOUNTAGUE and JUSTICE HALES thought not (a). And it was said by MOUNTAGUE, that the case was ruled by the opinion of all the Justices in the time of *Lord Rich*, when he was chancellor. See *T. 10. Eliz.* fol. 277. b. post. and *M.* [15. and 16. fol. 328. b. pl. 11.]

A termor devised his entire term, *provided that if the devisee died within the term it should go to I. S.* The devisee aliened the whole term, and then died before it expired. *I. S.* is without remedy.

8. Co. 95. a. 10. Co. 47. Plow. 522. Dy. 140. b. 28. H. 8. 7. a. Plow. 540. a. 8. El. 253. b. 358. b. B. N. C. 209. Plow. 516. 4. Co. 66. b. 1. Bullf. 191.

(a) See ante, note (a) to fol. 7. b. pl. 9. | note to Co. Lit. 351. b. and 2. Bac. Ab. 63, 64. But see *Mr. Butler's*

T. 6. E. 6. Rot. 522.

Partridge against Strange and Others.

A term is within the purview of the statute 32. H. 8. c. 9.

In a declaration against the lessors upon that statute, it is necessary to aver it to be a pretended right or title, but not to aver the commencement or duration of the term; and a mis-recital of the statute is fatal.

Plow. 78. S. C.

Raft. Maintenance, 7.

Dy. 95. 20. H. 6. 42.
Count. 32. 3. Eliz.
203. 2.

[1. And. 76. cont.]

[1. Hawk. Pl. C. 555.]

[1. Hawk. P. C. 556.]

[1. Hawk. P. C. 556.]
Dy. 374. 77. 4. Co.
26. 2.

[See the references to these points in the S. C. in Plow. 78.]

(19) **D**EBT was brought upon the statute of buying of titles, 32. H. 8. c. 9. And the action was brought, as well for the plaintiff as for the king, for eighty pounds, which was the value of the land; and declared upon the statute, and shewed that the defendants, "litle regarding "the aforesaid statute, after the making of the aforesaid act, "s. on such a day and year, &c. (and does not shew in "certain that this was within a year before the action was "commenced) one messuage, &c. in M. in the county of "Gloucester, of the value of eighty pounds, at M. aforesaid, "to one Robert Mill and one Gabriel Pleydall bargained, "granted, and to farm let for a term of years; of which said "tenements the said defendants nor any of their ancestors, "nor they through whom the said John and John claim the "said tenements, were in possession neither of the reversion, "or remainder thereof, nor received the rents or profits of "them by the space of one whole year next before the "aforesaid bargain, grant, or to farm letting thereof made, by "reason whereof an action hath accrued, &c." (20) And to this declaration the defendant demurred in law. And, Whether this lease for years be within the meaning of the statute or not? was the matter in law.

And three remarkable exceptions were taken to the declaration. The first was, a mis-recital of the aforesaid statute, supposing it to have been made on the 28th day of April, in the thirty-second year; whereas it was otherwise, &c. Also, that there ought to have been an averment that the lessors had a pretended right or title on account of the words of the statute. Also, for stating it to be a term of years without shewing certainty or commencement, &c. And by the opinion of the Court the two first exceptions are good, and of necessity they should be alleged. But as to the last they all held otherwise (except COKE, Justice), because the number of years here is not material; besides, the plaintiff is a stranger to it, and therefore cannot have notice of this contract. But for the matter the opinion was clearly, that the pretended title to a term is within the purview and intent of the statute. And another exception was also taken to the doubleness of the count, s. bargained and granted, where either of those terms might have sufficed; and this by two Justices.

Sir

* Sir John Brugis *against* Warenford:

(21) **A**N action upon the case was brought in the King's Bench for speaking these words, *s.* "*There is a great nest of thieves at Pirton, and Sir John Brugis is the maintainer of them, and he is a strong thief himself.*" And the defendant justified certain words which he did speak, purporting that he had a presumption and suspicion that the plaintiff was a maintainer of thieves; which are the same words that the plaintiff hath complained of, without this that he said and published the said *English* words in the aforesaid declaration specified in manner and form, &c. And the plaintiff replied, and maintained his declaration, *prist, &c.* And found by the verdict, that the defendant spoke and published all the aforesaid words in the declaration, &c. except the word "*strong*" in the said declaration also specified in manner and form as the said plaintiff hath alleged: and they assess damages to the plaintiff on that occasion, besides his charges and costs, at three hundred and fifty pounds; and for those charges and costs at twenty marks. And further upon their oath they say, that the defendant did not speak or publish the word "*strong*" in the said declaration specified in manner and form as the said plaintiff hath alleged. (22) And upon this verdict the Court was moved to stay the judgment, because the matter is not fully found in manner and form as the plaintiff supposed. And in *Easter Term* following, after a great argument and debate at the bar, the plaintiff had judgment to recover upon the said verdict; but it was moved as a doubt, Whether the plaintiff should be amerced in the case, or not? for the omission or addition of that (*a*) perchance would be error in the judgment. But *quare* as to that.

(21) "*Sir William Wray* keepeth a company of thieves at his mill, and I will not grind my grist there as long as they are there:" adjudged that these are not actionable, *E. 5. Jac. B. R.*

(21) By 16. & 17. *Car. 2. c. 12.* no judgment shall be reversed for want of a *miseriordia* or a *capiatur*, or because one is entered instead of the other; and by 5. & 6. *W. & M. c. 12.* the *capias pro fine* is taken away.

Proof of calling plaintiff a thief, will support a declaration for calling him a strong thief.

[Dal. 9. pl. 7. S. C.]

Dalt. 12. Dier, 19. 26. 72. 4. Co. 13. 18. 2. Rol. Ab. 717. Sty. 64. Allyn. 31. Dier, 118. b. 1. Rol. Ab. 217. P. 2. 1. Rol. Rep. 423. 2. Rol. Rep. 6.

Dier, 32. 215. 232. 9. H. 7. 13.

[See Buller's Nisi Prius, 5. 2. Bl. Rep. 791.]

Cro. Jac. 408. 3. Cro. 224. Post. 315. 99. Nota, Bro. Ab. Tit. Amercement, 27. 40. 47. E. 3. 40. 10.

[See Lilly's Ent. 508.]

Andrew *against* Boughey in *B. R.*

To a declaration for delivering three hundred and seventy-three pounds of bad wax upon an *assumpsit* for four hundred pounds of good wax, stating half of the price to have been paid in hand, the rest to be paid upon a day agreed on, plea of twenty pounds of wax *given and accepted in satisfaction* is good, but the declaration bad, because it is not averred that the day of payment is not yet come, or that it is past, and he hath paid the residue of the money. In all cases where nothing but amends are to be recovered, a concord with an execution thereof is a good plea.

z. Rol. Rep. 187.

* [75. b.]

5. Co. 117.

(23) **T**HE declaration was, That the defendant, “on
 “such a day, year, and at such a place, under-
 “took for twenty marks (the moiety of which was in hand,
 “paid, and the residue agreed between them to be paid
 “within a certain time), that he would deliver at such a
 “place, within four days after such a Feast, four hundred
 “pounds weight of good and merchantable wax; but the
 “defendant, not regarding his promise and undertaking, and
 “intending to defraud the plaintiff of all the profit that he
 “should have by the said bargain, and to draw him into
 “disgrace and infamy, afterwards, s. on such a day which
 “was before the Feast, did deliver to the plaintiff at the
 “said place three hundred and seventy-three pounds weight
 “of wax, falsely and deceitfully mixed with resin and tur-
 “pentine, &c. as parcel of the said four hundred pounds,
 “asserting and warranting the said three hundred and
 “seventy-three pounds to have been good, proper, and
 “merchantable, when it was not so; and that the said
 “plaintiff, confiding in the assertion and promise of the said
 “defendant in this behalf, and believing the said wax to
 “have been good, &c. afterwards sold it to one *B.* for
 “twelve pounds, and afterwards the wax became * for-
 “feited to the mayor and sheriffs of *London*, according to a
 “custom; whereby the plaintiff was not only compelled to
 “pay back the twelve pounds to *B.* but by occasion of the
 “aforesaid false mixing of the said wax was much hurt, and
 “brought into great infamy on that account, &c.” To
 “this the defendant, “*protestando* that the said three hundred
 “and seventy-three pounds which were delivered to the
 “plaintiff were of good and merchantable wax, &c. for
 “plea says, That before the said Feast at such a place the
 “plaintiff and defendant did agree, that if the defendant
 “would deliver immediately to the plaintiff one cake of

(23) *T. 3. Jac. Rot. 265. B. R. Lopus* [*Cro. Jac. 4.*] brought an action upon the case against *Chandler*, and shewed, that whereas the defendant was a goldsmith, and skilled in the nature of precious stones, and being possessed of a stone which the defendant asserted and assured the said plaintiff to be a true and perfect stone called a bezoar stone, &c. upon which the plaintiff bought it, &c. There the opinion of *POPHAM* was, that if I have any commodities which are damaged (whether viſuals or otherwise), and I, knowing them to be so, sell them for good, and affirm them to be so, an action upon the case lies for the deceit; but although they be damaged, if I, knowing not that, affirm them to be good, still no action lies, without I warrant them to be good. [*3. Bl. Com. 166. Dougl. 158.*]

“ wax

“ wax weighing twenty pounds, the defendant would accept
 “ that in recompence as well for the aforesaid three hundred
 “ and seventy-three pounds as for the residue which was to
 “ be delivered,” and pleaded this executed in certain, with
 the acceptance by the plaintiff accordingly, *and this, &c.*
 (25) Whereupon the plaintiff demurred in law; because
 the deceit, which is the effect and substance of the matter,
 (*ut dicitur*) is not answered. And the bar seemed good
 enough, for the effect and substance of this action is, that
 the defendant hath not performed his bargain, *s. with good
 and merchantable wax*, according to his undertaking, but
 that it was corrupted and mixed as above, and deceitful, for
 which the plaintiff has received satisfaction and recompence
 by the cake, and his own acceptance, although it were not
 of one hundredth part of the value of his loss, yet by his own
 accord and agreement this injury is dispensed with; and in
 all actions in which nothing but amends is to be recovered
 in damages, there a concord carried into execution is a good
 plea. (26) And therefore in a writ for forging false deeds
 in 19. H. 6. [29.] where pl. 52. it is ruled, that accord is
 a good plea. The law is the same of an award, for there is
 no difference between an award and an accord, excepting
 that an award may be pleaded although the time of perform-
 ing it be not yet come, but an accord must be executed and
 satisfied before the action brought, or it is not a bar, 6. H. 7.
 [10.] for in the former case the party may have debt upon
 the award *quia transit in rem arbitratam, &c.* (27) Also
 in attain upon a writ of trespass, accord pleaded by one of
 the petit jury between the plaintiff in attain and the defen-
 dant, was holden a good plea in 13. E. 4. [5.] by the better
 opinion; and in all actions founded upon torts, as trespasss,
 conspiracy, maintenance, and such like, where nothing certain
 is demanded, nor to be recovered, but only damages, accord
 is a good plea; and to say that the accord here does not
 answer the deceit and the false mixture, that is included in
 the principal, *s. the wax*, of which the contract and under-
 taking were. (28) And it seems here also that the deceit is
 not material, for the plaintiff in his declaration hath alleged,
 that after the undertaking, and the contract made, and before
 the Feast at which the wax should be delivered, *s. on the
 third of September, &c.* the defendant made the affirmation,
 and warranted that the wax * was good, &c. to which the

Co. 19. 78. a.

19. H. 6. Arbitra-
 ment, 6. B. 21. 6. Co.
 44. Cro. Jac. 100.

[Cro. El. 364. 1. Mod.
 69. 1. Ld. Raym. 122.
 a. Term Rep. 25.]

19. H. 6. 36. b. Br.
 Accord. 8. F. Bar. 26.
 3. H. 6. Accord. 5. Cro.
 70. 121. 28. H. 6. 12. a.
 5. 7. 9. 13. 16. E. 4.
 7. a. 23. b. 51. 1. b.
 8. and 9. 10. 11. 13.
 H. 7. 24. a. 28. b.
 20. Plow. 6. 17. E. 4.
 2. b. Dier, 356. 6.
 H. 7. 16. b. 10. a. 7.
 4. a. 43. E. 3. 28. b.
 1. Rol. Ab. 129. (12).
 11. H. 7. 11. b. 18.
 E. 4. 9. a. 3. El. 201.
 b. 6. Co. 44. 4. 12.
 H. 6. Maintenance,
 27. Accord. 27.

[* 76. a.]

9. 11. H. 6. 53. b.
18. a. 11. E. 4. 6. a.
N. B. 98. b.

5. H. 7. 18. a. 11.
H. 4. 6.

7. E. 4. 31. a.
Plow. 66. b. Dyer,
119. b. 8. 11. Co.
233. 5. 2.

2. Keb. 23. pl. 46.

45. E. 3. 8. 4. Co.
88. Hob. 41.
1. Bulst. 167, 8.
Post. 236. a. 336. b.
Davis, 1. b.
Co. Litt. 204. a.
21. E. 3. 7. 28. H. 6.
6. b. 45. E. 3. 8.
28. H. 8. 6. b. 24.
E. 3. 54. a.

[Lutw. 251. 1. Salk.
171.]

7. H. 6. 1. a.

plaintiff gave faith and credit, which is the cause of his deceit, for without a precedent trust a man cannot be deceived. And here the warranty and promise of the goodness of the wax was void, and of no force in law, because it was not made immediately upon the contract, but a month after; and that is not good according to 5. H. 7. [41. b.] And then from first to last, if the promise and warranty that the defendant made on said third day of *September* be void, then is the confidence and faith given to it by the plaintiff in vain and of no force; and then it follows of course, that the plaintiff was not, nor could be deceived by the intendment of the law: the deceit therefore is immaterial, and needs not to be answered. (29) And it seems for another cause, that although the plea were not good, still the plaintiff shall not recover; for if it appear to the Court, that the plaintiff in any action had not good cause to have his action, the Court will never give judgment for him; here it appears in the beginning of the count, that *for* twenty marks, the moiety of which was in hand paid, and the other moiety was to be paid *at a certain time agreed on between them; non constat whether* that time was past, or to come, at the time of this action brought; and if it was past, as it shall be intended most strongly against the plaintiff, and the money not paid or legally tendered, then the contract and undertaking is void, for this word (*for*) makes the contract conditional; as *for a marriage to be had I covenant to make an estate, &c.* if the marriage do not take effect I shall be discharged from this covenant. (30) The law is the same of an annuity granted *pro consilio impendendo; cease to give counsel, and the annuity ceases.* And in 9. E. 4. [20.] and in 15. [E. 4. 4. a.] also, If a man grant to one a way over his land, and he for having this way grant him a rent charge, if the one be stopped, the other is stopped; so it is in contracts; as if *for an hawk to be delivered to me on such a day*, you shall have my horse at *Christmas*, if the hawk be not delivered at the day you shall not have the action for the horse, &c. Here then the strength of the matter (which may be variously taken and expounded) shall be construed against the party who shews or pleads it, *s.* that the time of the payment was prior to the time of the deliverance, or at the very time of the deliverance, or at most within one year afterwards; and here were almost two years between the Feast when it was to have

have been delivered, and the time of the action brought, and then the declaration should have been, *at a certain time yet to come agreed on between the parties, &c.* then the declaration would have been good; wherefore, &c.

[1. Ld. Raym. 665. and see *Peeram v. Palmer*, Gilb. Law of Evid. 191. and Dougl. 684.]

It seems that this last exception is not a good one, for if I, in consideration of ten pounds to be paid at *Michaelmas*, promise you an horse, it is no plea that the money is not paid : and so hath it been often adjudged.

* The Administrators of Vincent *against* Dale,
in Error.

* [76. b.]

(31) *VINCENT* was cast in debt, and a writ of execution of *ieri facias* awarded, and before the execution he died intestate; the ordinary committed the administration, upon which the sheriffs levied the execution (*a*), and delivered it to the party, and made no return of it (*ut credo*) : and the administrators brought a writ of error, and reversed the judgment. But *quare* of the writ of error by administrators, &c.

If the defendant die after the writ awarded, and before execution, it may be served upon his goods in the hands of his administrator.

4. Co. 67. a. 15. 16. H. 7. 16. b. N. B. 21. M. 6. H. 8. 1. 3. Cro. 181. 11. H. 4. 65. b.

[1. Crompt. Praet. 349. F. N. B. 50. N.]

(31) *M. 40. and 41. Eliz. C. B.* *A.* had judgment against *B.* and a writ of execution; *B.* died, the sheriff levied the money, this execution is void; but in such case, if *A.* the plaintiff had died before the execution, and afterwards it is executed, this had been good enough, and the sheriff might deliver the money to the executors; or if there be neither executor nor administrator, the sheriff may bring the money into court until administration be granted. [Thoroughgood's case, Noy, 73.]

(a) By the common law goods and chattels were bound by the award of execution, but by 19. Car. 2. c. 3. §. 16. "No writ of exe-

cution shall bind the property, but from "the time of its delivery to the sheriff." Bul. Nis. Pr. 91. See 1. Term Rep. 729.

Kettilesby against Kettilesby.

(32) *IN* a writ of dower the demand was of three manors, and the tenant pleaded in abatement of the writ, that *puis darrein continuance* the demandant had entered into part

In dower, that the demandant entered into part of the land *puis darrein continuance* is a

(32) *M. 19. Jac. & William Grafton* brought a formedon against *Richard Grafton*, and demanded in his writ one messuage, six acres of land, &c. And *R. G.* pleaded that the demandant was seised of one moiety of the messuage and land, and prayed judgment of the writ, upon which the plaintiff demurred, because the tenant pleaded that the plaintiff was seised, and did not shew how, whether it was by disseisin, recovery, or assignment, according to the case, 39. E. 3. 17. b. And *per Cur.* He need not; but he ought to say that he was seised in his demesne, as of freehold, fee tail, or fee. And because it was confessed by the demurrer that he was seised, and by the evidence that he was seised in fee, the writ abated by judgment, for he had brought a false writ: and secondly, It was agreed, that if the plaintiff enter into one acre after the writ purchased, all his writ shall abate, for he hath falsified his own writ.

good plea in bar. And if she would reply her quarantine, she must shew the death of her husband and the time of the forty days.

[Raft. Enft. 234. a. S.C.]

34. 35. 39. H. 6. a.
13. 43. E. 3. 5. b. 4.
E. 4. 4. 34. 5. H. 7. 7.
Dier, 107. a. 12. H. 7.
14. b. Croke.
Winch. 90.

Co. Litt. 32. b. 34. b.
N. B. 161. a. 29. H. 6.
14.

[2. Bac. Ab. 122, 123.]

Co. Mag. Chart. 17.
Hob. 153. Moore, 903.
[Booth Real Act. 169.
1. Com. Dig. 62.]

of the place demanded, and shewed it in certain; and this was holden a good plea in a writ of dower, because she demands the freehold, and by her own entry (although that was an illegal one) she hath abated her whole writ. But see 45. E. 3. [5. b.] in *scire facias* to have execution of dower recovered, such an entry was holden no plea. (33) And the demandant, to maintain her aforesaid writ, said, that her husband in his life-time was seised in fee of one of the said manors of which, &c. upon which said manor he and she the said demandant cohabited together as man and wife until the day of his death; that he died seised by protestation, and that it descended to the defendant as heir, &c. and he entered, and the demandant and he, continually since the death hitherto, have been commorant and lived together upon the said manor, and that she claims only at the will of the heir, and the occupation thereof at his will, and no otherwise. And this was holden no plea for the quarantine; for she ought to shew the death certainly, and the time of the forty days. And afterwards, upon the opinion of the Court, she waived the plea, and traversed the entry.

Henslow and Stansby *against* the Bishop of Sarum and Keble, Clerk.

In *quare impedit* the patron's not being made a party to the writ is not error; nor that damages were adjudged for half a year's value under *West. 2. c. 5.* where it appeared that the presentation was not de-raigned within the six months.

6. Co. 52. Sty. 328.
Stat. 14. E. 3. c. 16.
Raft. Nisi Prius, 6.
West. 2. cap. 30.
Dier, 135. a. 260. a.
3. Cro. 706.

(34) **T**HE plaintiffs recovered the presentation in a *quare impedit*, by a verdict given before Justices of assize, and judgment there given before them by the statute; and a writ awarded for the plaintiffs to the archbishop of C. metropolitan, and a *feri facias* to the sheriff for damages. The defendants brought a writ of error, and removed the record into the king's bench in last Trinity Term, and assigned no error, and had a *superseas*, *s. non molestari*, to the metropolitan to surcease from execution until the error be tried: and this *superseas* was made in C. B. And the plaintiffs in the *quare impedit* sued out a *scire facias* to the sheriff of Wilts against the bishop and the incumbent to have execution, because they were too late in the assignment of their errors: and the *teste* of the writ was the first day of this Term, *s. the 10th of October*, returnable on the morrow of All Souls. And this *scire facias* was made in B. R. reciting the judgment and removal of * the record into B. R.

B. R. at which day the writ was returned served, *s. scire fieri, &c.* And now the plaintiffs assigned error.

(35) And by the opinion of the Court, they have sufficient time to do that, although they are not the plaintiffs in this suit; for this *scire facias* brought by the defendants is somewhat in the nature of a writ for the assigning of errors, but there are no such words in the writ, and the clerks say that they have no other form of words in such writs. And the errors were two. 1st, Because it was found by the inquest, *ex officio*, that *Keble*, who was the incumbent, was in of the presentation of the lord *Parry*, a stranger to the writ, not named in the writ. The other is, Because damages for half an year were adjudged to the plaintiff, where it appeared that the *† presentation* was not deraigned within six months.

(36) And the words of the statute *W. 2. c. 5.* are there recited, *s. that if within the time of six months the presentation be deraigned, then damages shall be adjudged to the value of a moiety of the church for one year.* And the writ of error was directed to the Chief Justice of the bench, *s. because in the record and process, and also in rendering the judgment of the plaint which was before you and your fellows by our writ between, &c.* It was moved that this writ was false, because by all these words it shall be intended that the judgment too was given before the Justices of the bench, where in truth it was by the Justices of *nisi prius*. And in this doubt *BROMELEY, Chief Justice*, continued.

And yet, notwithstanding this and the errors aforesaid, the first judgment was affirmed, and damages assessed by the Court, and costs (*a*), according to the statutes of 3. *H. 7.* [c. 10.] and 10. [19. *H. 7. c. 20.*] And this was upon surmise that execution had not been had, and the plaintiffs could not deny it; and a writ of execution was awarded to the guardian of the spiritualties of the archbishoprick of *Canterbury*, the see being vacant by the attainder of archbishop *Cranmer*.

† Orig. *non-summons*.

After error brought, and a *supersedeas* awarded, if defendant sue a *scire fac.* to have execution, the plaintiff may appear and assign error.

See 20 *H. 6.* 18. *N. B.* 18. 20. 9. 8. *E.* 4. 7. 2. 2. *H.* 7. 19. 3. *Cro.* 558.

[2. *Term. Rep.* 17. 3. *Burr.* 1772.]

6. *Co.* 52. 8. 14. 42. 47. *E.* 3. 5. 20. 7. 11. 1. *H.* 5. 7. 3. 7. 11. *H.* 4. 2. and 11. 37. 8. *N. B.* 36. b. 8. *H.* 6. 24. 22. *E.* 4. 44. *Dyer*, 48, 241. 7. *Co.* 26. *Plow.* 48. *M. 6. E. 6.* Rot. 107.

5. *Co.* 127. 1. *Rol. Rep.* 16.

Dyer, 250. 2. 235. 2.

In error in *quare impedit* the defendant shall have costs and damages.

[*Sayer, Costs*, 199. *Sayer, Damages*, 96. et seq. 2. *Str.* 931.]

4. *Car. Cro.* 146. 2. *Rol. Ab.* 590. *Raft. Damages*, 3, 4.

(a) But in *quare impedit*, though the defendant have judgment on demurrer, he is not entitled to costs, under 8. and 9. *W. 3.* c. 10. *Hen. Black. Rep.* 530.

Alington against Dr. Cox, Almoner.

Where the king, after making a lease of lands for years *with the deodands*, granted all *deodands* generally, not reciting the lease, to his almoner, and after the expiration of the lease, made a new one like the former; the second lessee, and not the almoner, shall have these deodands.

Dyer, 262. a.

2. Mar. 108. a.

3. H. 7. 16. a. 39. H. 6. 48. b.

[See Sheph. Touch. 74. and the books cited in note 3. there. See vide 1. Rep. 50.]

* [77. b.]

3. H. 7. 1. & 12. 6.

11. E. 4. 8. 1. 6. H.

4. 14.

(37) KING Henry 8th made a lease of *Richmond Fee*, with all *deodands* and goods of *felons de se*, to *M. Chickley*, for a term of years, rendering rent; and, during this term, the now king granted the office of almoner to *Dr. Cox durante bene placito*; and afterwards, by letters patent granted to him, in augmentation of the alms, *all the goods and chattels of felons de se*, as well within the liberties as without, within the kingdom of *England*, to have as long as he should hold his said office. And afterwards the term of *Richmond Fee* expired; and the king made a new lease of it *as before* to the said *Alington* for a term of years, rendering rent. And now the question was, Whether the almoner or the lessee should have the *deodands*? &c. And the LORD MOUNTAGUE thought that *Alington* should have them, because the grant to *Cox* during the first term, * without recital of the former lease of that, is void; wherefore, &c. And he recited this verse of *deodands*:

“*Omnia quæ movent ad mortem sunt deodanda.*”

(37) Almoner is an officer of the court to collect with care all the fragments, and every day to distribute them to widows, decrepit, &c. *Fleta*, lib. 2. c. 23.

By a grant of all the goods of *felons de se* to an almoner, he shall not have them *ratione officii*; but by the grant of the king, he is an officer for that purpose, and accountable by stat. 6. E. 6. c. 16. Mr. Andrews in his reading upon this statute, August 1628.

A man was killed by the lifting up of a bell-rope, by ringing the bell; and the bell was accounted a deodand; but, in favor of the Church, it was redeemed of the almoner for sixteen shillings. *Norff. & Caudray*, 4. & 5. Mar.

Harrington against Pole.

Lease of an abbey, “and
“all lands, meadows,
“pasture, and the un-
“derwritten, with the
“appurtenants, &c.
“viz. such a close and
“such a close;” the
word *viz.* relates only
to the underwritten, and
all other lands shall pass
by the express words.

Hob. 173.

16. El. 331. b.

(38) THE king made a lease of the scite of an abbey by these words: “and also all lands, meadows, pasture, and the underwritten, with the appurtenants, lately belonging to or regarding the said monastery, (*viz.*) such a close, such a close, and such a close;” and so on, describing the different closes: Whether this word (*viz.*) shall have reference to explain this word (*underwritten*), or shall refer to the whole sentence, *s.* to all the lands? &c. And LORD MOUNTAGUE, and JUSTICE MARVYNE, and others, thought, that it should have relation only to the underwritten,

derwritten, which is particularly recited afterwards; and if there be any other land belonging to the said monastery, the grantee shall have it, &c.

Rayner *against* Rayner.

(39) *WILLIAM* Rayner, tenant in tail general, before 27. H. 8. [c. 10.] enfeoffed divers persons in fee to the use of himself for the term of his life, and after his decease to the use of *William* his heir apparent, and the heirs male of his body lawfully begotten; and, for default of such issue, remainder to *Marmaduke R.* (the plaintiff in the assise) in tail, with divers remainders over, the fee simple to the right heirs of the said *William*, the feoffor. *W.* the feoffor died before the statute, and afterwards the statute passed; by which, *William* the first remainder-man became seised, and had issue a daughter, and died without issue male. And the question now was, Whether *Marmaduke* the plaintiff in assise might enter or not? and it all depended upon this, Whether *William*, who was inheritable by the ancient entail, and remainder-man under the new entail, and in possession by the execution of the statute, was remitted or not? And it seemed that he was not. And so was the opinion of the Justices of assise, for the plaintiff recovered judgment upon this matter found.

The issue of tenant in tail, who, before the statute of Uses, discontinued and made a feoffment in fee to the use of himself for life, remainder to the use of that issue in tail, after the death of his father, and after the statute passed, is not remitted. Dy. 23. b. Plow. 246. 34. H. 8. Br. Remitter, 49. 2. Rol. Rep. 35, 36. 34. H. 8. 5. 4. a. Dy. 51. b. 111. a. 191. b. Plow. 114. a. [Hob. 254. Co. Lit. 348. b. 3. P. Wms. 461. and Plow. 111. &c. Edit. 1761. Com. Dig. Remitter, (C. 6.)]

Abbot of Kingwood's Case.

(40) *THE* Abbot of *Kingwood*, in the county of *Wilts*, in the 29th year of *Hen. 8.* made a lease under the convent seal, of a park or close of wood, in *Wofstworth*, in the county of *Gloucester* (which was three miles distant from the said house), for the term of eighty years, reserving a rent of five shillings: and the House, within the year, was dissolved. And this park was not ever in lease before, but every twenty years, the wood there was sold to the country, and was never reserved to their own use for hospitality. *Quare*, Whether this lease be within the statute of 31. H. 8.

A lease made one year before the statute of Dissolutions, of an Abbey-wood which had been sold every 20 years to the country round, is void.

Raft. Monasteries, 11

[c. 13.] And by the opinion of the Judges of the common pleas, it is within the statute, and therefore void. S. P. M. 3. & 4. El. fol. 206, 207. post.

[* 73. a.]

* Littleton *against* Hunkleton.

H. 5. & 6. Rot. 546.

In attain, the grand jury was returned summoned by the sheriff, who was related to one of the petit jury; but the re-summmons, distrefs, and *tales*, werereturned by a new sheriff; the grand jury being quashed, the *tales* were quashed also.

[Dal. 11. pl. 13. S. C.]

1. Inst. 156. a. 158. a.
Dy. 91. b. 193. 245.
21 H. 6. 22. a. Stamf.
Cor. 155. b. 5. H. 5.
1. a. 10. Co. 104. b.
9. E. 4. 46. 14. H. 7. 7.

[21. Vin. Ab. 236. 3.
Bac. Ab. 252. Antc,
38. a.]

34. H. 6. F. Enquest, 30.
B. N. C. 477.

14. H. 7. 1. 30. 31.
15. H. 7. 1. 20. H. 6.
24. b. 11. H. 4. 17. 18.
62. 63. Plow. 519. b.
Dy. 37. b. 55. b. 218.
a. Dr. & Stu. 157.

[Bul. Ni. Pr. 308. 2.
Hawk. P. C. 221. 12.
Mod. 111. Salk. 654.]

(41) **T**HE return of a summons in attain was made on the Octave of *Saint Michael* by a sheriff; and upon this process was continued, s. a re-summmons, and distrefs with a twenty *tales*, and also sixteen *tales*, and returned by a new sheriff; and the grand jury and divers of both the *tales* appeared on the Octave of *Saint Michael* in this present Term; at which day the first panel was challenged by the plaintiff in attain, on account of the first sheriff's being of kin to one of the petit jury; and the array was quashed. Now it was much doubted by the Court, whether the array of the *tales* should also be quashed; and at length, at the peril of the plaintiff, as well the *tales* as the principal panel was also quashed, and a new writ of summons awarded to the sheriff. Yet it was done otherwise T. 14. E. 4. Rot. 474. where the principal panel was quashed by two triors of the same panel, and the same triors also were charged to try the panels of two *tales*, s. of ten and eight, made by the under-sheriff of the new sheriff, and then for their misbehaviour (s. that one of them gave a verdict to quash the array without the assent of his companion, for which he was fined, and the other was found with a box of sugar-candy in his sleeve after his departure from the bar) both of them were discharged from giving any verdict, and two new triors were appointed of the *tales* of ten, and, by them both, the *tales* were quashed; therefore a *venire facias de novo* was awarded, with a proviso, that the under-sheriff, by name, &c. by whom the two last panels were made, should not intermeddle.

(42) It also appeared, in an appeal of the most execrable murder of one *Nicholas Radford* of *Upcot* in *Cadley*, in the county of *Devon*, gent, one of the most notable and famous barristers at law, and a justice of the peace there for thirty years, brought by one *John Radford* his cousin, against

(42) See Rast. Ent. 118. b. where he challenged the array of the principal and *tales* also, because it was made at the nomination [of the party.]

divers

divers accomplices of the *Lord Courtenay, Earl of Devon*, in *Hilary Term*, in the 34th year of *H. 6.* in *B. R. Rot. 77.* 11. 33. H. 6. 40. 21, in which the principal panel was quashed upon a challenge for the favor of the sheriff; and yet there was a *tales*; and a distress was awarded against them, and an order to add ten *tales de novo* to the other ten *tales*. And all the circumstances of the said heinous murder appear in the said Term, *Rot. 88.* in English, which was the tenor of an act of parliament; and yet nothing came of it, as it seems: and see, for a similar matter, *H. 12. H. 7. Rot. 34.* and in *Raft. Ent. fol. 117, 118.* and in *Stamf. Pl. Cer. fol. 155, b.* [a. Hawk. P. C. 579.]

Charleton *versus* Saunders et Al^o.

(43) **A**SSISE [of lands] in *Middlesex* was brought in *C. B.* and the writ was of a freehold in *Coveley* at *Cowley*. And the plaint was of one messuage, one hundred acres of land, ten acres of meadow, thirty acres of pasture, and ten acres of wood, with the appurtenants, &c. And it was pleaded, that the tenements, &c. are in *Helington*, and not in *C.* and judgment prayed of the writ; and if, &c. *nul tert, &c.* *Quere*, Whether it be necessary to traverse their being in *C.* because the writ is only supposal, *s. of a freehold?*

In assise, the writ being of a freehold in *C.* and the plaint of one messuage, &c. Whether the defendant pleading that the tenements were in *H.* must traverse their being in *C.?*

5. 6. H. 7. 3. 5.
Dyer, 242. 260. b.
19. H. 6. 1. 11. H. 4.
2. 6. 8. E. 3. 2. 44.
[Cro. El. 705. 1. Wils.
81. Doct. Plac. 357.
5. Com. Dig. 116, 117.]

* Sir John Prife, Knight, *against* the Archbishop of Canterbury and Others.

* [78. b.]

(44) **A**QUARE *impedit* was brought by *John Prife*, Knight, against the Archbishop of *C. Lord Windsor*, *Thomas Rowe*, clerk, and *John Plat*, clerk, for the benefice of *Weston Turvil*, in the county of *Bucks.* And he declared, that *John Hampden*, Knight, was seised of the advowson of the fourth part of the aforesaid church *in gross*, as of fee and right, and presented *Walter Willey* his clerk, who was admitted, instituted, &c. in the time of *Hen. 8.*; and that *Sir Reynold Bray*, Knight, was seised of the advowson of one other fourth part of the aforesaid church *in gross*, as of fee and right, and presented one *John Dale* his clerk, the

In *quare impedit*, the plaintiff claiming the church as *in gross*, and setting out a presentation from the person under whom he claimed; Whether the defendant claiming the church as *appendant*, ought to traverse that it is *in gross*, or the presentation?

[Cliff's Ent. 606. S.C.]
5. 10. Co. 102. 136.
1. Inst. 18. a.

45. E. 3. 12.

church

church being void by the death of the said *Willey*, who was admitted, &c. ; and that *Sir Richard Sacheverel*, Knight, and *Lady Hastings* and *Hungerford* his wife, were seised of a moiety of the manor of *Weston Turvil*, to which the advowson of one other fourth part of the said church appertained in his demesne, as of fee, in right of his wife ; and the said *Sir Richard* presented to the said church, it being void by the death of *Dale*, one *John Ledbury*, who was admitted, &c. ; and that one *Sir Peter Vavisor*, Knight, and others (by same) were seised of the other moiety of the said manor, to which the advowson of one other fourth part of the said church belonged in their demesne, as of fee, who presented one *Gowel* to the church, being void by the death of the said *Ledbury*, who was admitted, &c. ; and that afterwards the said *Sir John Hampden* granted the next avoidance to the plaintiff and divers others ; and averred the death of them, and that he is in by survivorship ; and that now the church is void by the death of *Gowel* ; and averred that this is the next avoidance after the said grant ; and the archbishop claimed nothing but as ordinary. And *Lord Windsor* pleaded in bar, that *Sir Andrew Winsor*, his father, was seised of a moiety of the said manor of *Weston Turvil*, to which the entire advowson of the church aforesaid belonged in his demesne, as of fee ; and so being seised, enfeoffed *Sir Peter Vavisor*, Knight, and others in fee, to the use of the said *Andrew* and his heirs ; and pleaded the use executed into possession by the statute ; and conveyed the moiety, with the advowson, to himself, by descent from the said *Andrew W.* and that it now belongs to him to present ; *without this*, that the said *Walter Willey* was admitted and instituted to the said church upon the presentment of the said *Sir John Hampden*, in manner and form, &c. (45) And it was much doubted, whether this traverse is well taken or not ; for some said, that the traverse should have been, *without this, that the advowson is in gross, &c.* But *quere inde*, for the parties do not make title or conveyance to the advowson all of the same person ; and therefore see 20. *E. 4. 11. [& 13. 15.]* And in ϕ Lib. Int. fol. 130. the presentment was traversed as above, and not whether appendant or in gross ; and this issue should be tried by the ordinary.

21. E. 4. 1. 2. 3. 4.
 8. E. 3. 57. 15. H. 6.
 Quare Imp. 77. 10.
 H. 7. 27. 9. H. 6. 59.
 40. E. 3. 10. 22. H. 7.
 Cro. 91. Dier, 260.
 21. E. 4. 12. Bro.
 Traverse, 257.
 [1. Leon. 154. Vaugh.
 9, 10. &c. 3. Mod.
 Ent. 224.]

* Hilary Term,
6. and 7. Edw. 6.

* [79. a.]

Chickeley's Case.

- (46) **T**HE master and fellows of *Clare-hall, Cambridge*, leased a parsonage, by indenture, for a term of years to *Chickeley*; and in the indenture was this clause, *s. "and the said lessee, his executors and assigns, shall continually dwell upon the mansion-place of the said parsonage, during the said term, upon pain of forfeiture of the said term and interest."* This was holden, by the Court, a good condition; and that, if it be broken, the lessors may re-enter; for this clause is made by the consent and words of both parties, &c. and the case, *s. that it shall not be lawful for the lessee to give, sell, or grant the estate, &c. upon pain of forfeiture, &c.* was holden a good condition [ante, fol. 66. pl. 8.]. See a condition by a proviso and covenant at the same time, *M.* [4. &c] 5. [*P. & M.* 152. a. post.] See a like matter for a condition, *M.* [32. *H.* 8.] antea, fol. [45. b. 46. a.] in a last will; and postea, fol. [138. b.] and *q. H.* 18. *Eliz.* fol.

This clause in an indenture of lease, 1. "*and the lessee shall continually dwell upon, &c. under pain of forfeiture,*" is a condition; and, if broken, the lessors may re-enter.

1. *Rol. Ab.* 408. (E) 9. *Pl.* 23. a. *Plow.* 113.
10. *Co.* 42. *Co. Lit.* 204. a.
2. *Bulst.* 290.
3. *E.* 6. 66. a. *Dier.* 136. 318. b. 6. *Co.* 5. a. [*Cro. Jac.* 398. a. *Bulst.* 290. a. *Com. Dig.* 438. 1. *Wood's Conv. Covenant*, F. *Sheph. Touch.* 51. 120. *Co. Lit.* 203. b. *Mr. Hargrave's note* (1).]

Colvil against Huddleston.

- (47) **I**N a formedon, the tenant vouched one *Townsbend* as cousin and heir of *Sir Roger T.* and for his nonage, prayed that the parol might demur. And, by the opinion of the Court in the bench, he ought to shew *how cousin*. And this agrees with *q. 16. E.* 3. but *contra* in *15. E.* 4. [4. b.]

In a formedon, the tenant vouching an infant as cousin and heir, must shew *how cousin*.

6. *Co.* 5. 5. 9. 21. *E.*
4. 6. 36. 25. 27. 41.
45. *E.* 3. 84. 14. 25.
21. 37. *Aff.* 4. 5. 6.
- H.* 4. 1. 5. *E.* 4. 5. 8.
45. *E.* 3. *Gard.* 99.
2. *Bulst.* 2.

- (48) **A** MAN seised of a manor, within which was a wood containing thirty acres, in which and divers other places of the manor are divers great trees, made a lease of the manor, *except all manner of timber-trees and great woods*; Whether the *underwood* and the *herbage* of the thirty

Timber-trees and *great woods* being excepted in a lease, do not include *underwood* or the *herbage* of the woods.

4. 11. *Co.* 62. 47. 14.
 - H.* 8. 1. *Dier.* 19. a.
- acres

5. Co. 11. 1. Inf. 4. b. 23. Eliz. 374. b. 46. 5. 3. 22. b. 3. Bull. 290.
[Cro. El. 17. Bro. Grants, 167. Vin Ab. Reservation, (U). 1. Rep. in Chan. 134, 135.]

acres are excepted by these words? was moved. And HALES, BROWN, and COKE, *Justices*, thought that they are not, but that the lessee should have them; for by this word "*great*" the intent of the lessor appeared, what trees he would reserve, and none others. But MOUNTAGUE *à contra*.

Prohibition granted after sentence in the spiritual court for tithes, where a *modus* was pleaded.

Regist. Original, fol. 38. Godb. 63. 2. Co. 44. Fitts. 44. 1. Dr. & St. 177. a. 18. El. 349. b. 44. E. 3. 32. Br. Prohibition, 3. 44. E. 3. 36, 37. 11. Co. 16. b. N. B. 43. 6. Co. Magn. Chart 491.

[But see Cowp. 422. 1. Str. 187. 1. Term Rep. 552. Dougl. 378. 2. Term Rep. 473. 1. Black Rep. 295.]

* [79. b.]

(49) **A** MAN had used to pay for the tithes of a close, for the space of sixty years or more, only twelve-pence by the year, to the parson or vicar for the time being; and the parson now had a farmer, who sued in the court christian for these very tithes; and he pleaded this payment of twelve-pence for tithes; and it was not allowed by the ecclesiastical Judge; but sentence given there for the farmer. A prohibition was granted in this case in *B. R.* upon good advisement, with the said averment in the surmise, that * the court christian would not admit the said plea there. And although this rent was issuing out of the land, so as it is such rent for which he may have assise, or distress for it, yet the prohibition shall be granted by the opinion of the Court. Yet *quare* 8. E. 4. [14. a.] and * the court christian would not allow such matter as above as a *modus* for tithes; and therefore in reason a prohibition shall go.

So agreed in *Sufans v. Turner*, M. 39. 40. Eliz. C. B. [Noy, 67.]

In a writ of right, if after service of the writ of summons, all the knights do not appear, an *habeas corpora* shall be awarded to the sheriff to have them at a day certain.

Dier, 104. a. 270.

[Booth. Real Act. 97. But Glanvil says, if one only appear, by consent of parties he may proceed to elect the twelve. Lib. 2. c. 12.]

Lord Windfor against Saint John.

(50) **I**N a writ of right by *Lord Windfor* against *Saint John*, the writ of summons to four knights girt with swords was returned served, and only two of the knights appeared; and by the opinion, an *habeas corpora* shall be awarded to the sheriff, to have them at the Octave of the *Trinity*; and the precedent of 4 17. H. 8. agrees with that; and it seems no *alias* summons shall be awarded.

Haward et Ux' versus Duke of Suffolk et Al'.

A writ brought by R. H. and Lady A. P. his wife, is bad; she must be called

(51) **A** WRIT of partition was brought against the *Duke of Suffolk* and his wife, and others, by

(51) In *Shirewood's Case*, H. 2. Car. B. R. [Latch. 174. Noy, 88.] in trespass, the defendant justified the taking by command of *J. Potts*, Esq. and *Lady Ursula* his wife. And exception was taken to it, because a gentleman could not have a lady to wife. And the Court answered, That would be a good exception to the writ, but not here.

Ranulph

Ranulph Haward, Esq. and *Lady Ann Powys* his wife; and so was she named in the writ: and exception was taken for a misnomer, because she ought only to have been called by the name of her husband, and not otherwise. And, by the opinion of MOUNTAGUE, *Chief Justice*, and HALES, *Justice*, the exception is good; because, by the law of God, she is under the power of her husband, and so her name of dignity shall be changed according to the degree of her husband, notwithstanding the curtesy of the ladies of honour, and of the court. Upon which the plaintiff brought a new writ to answer to *Ranulph H.* and *Ann* his wife, late wife of the *Lord Powys* deceased. (52) And note, that the plaintiff shewed the said *Ann*, in the declaration, to be co-heiress in tail with the defendants of the inheritances of *Charles* late *Duke of Suffolk*, without shewing the commencement of the entail: and yet that was holden good enough in this action, which affirms the possession of the defendants, and does not make demand of any land; wherefore, &c. Also the defendants pleaded, that the said *Ann* the plaintiff, as daughter and one of the heirs of the said late *Duke*, ought not to have partition; because, they say, that she was begotten and born between the aforesaid late *Duke*, then called *Charles Brandon*, Esq. and one *Ann Brown*, before any espousals were celebrated between the said *C.* and *A. B.* to wit, at *London*, &c.: and shewed, besides this, that afterwards he married the said *Ann B.* and by her had issue *Mary*, &c.: and shewed further, another marriage, and that he had issue the other defendants; and died seised, and they entered, and prayed judgment, if partition, &c. And this was holden good pleading, without a traverse of the co-parcenary. And the plaintiffs replied, that she was born in wedlock; without this, that she was born before espousals, &c. And a *venire facias* was awarded in *London*. Note this.

(52) 39. *Elix.* ♦ *Lady Latan's Case*. A writ of partition is maintainable without shewing of whose gift; and divers precedents were shewn *accordant*, Co. Ent. 412, 413.

only *A.* his wife.

In a writ of partition by them, he declaring that his wife was co-heiress with the defendants in tail, need not shew the commencement of the estate.

Special bastardy is a good plea without traversing the co-parcenary, and the trial shall be where the birth is alleged.

[Co. Lit. 16. b. 1. Bl. Com. 401.]

19. H. 7. Cro. 53. w.

14. H. 6. 11. 2. & 3.

4. Co. 318. Br. Brief,

546. B. N. C. 499.

Noy, 88. Poph. 208,

209. F. N. B. 216,

3. El. 202. 2. Co. 6.

53. b. Br. de Noms

de Dignity, 31. 69.

3. 5. H. 6. 35. 15.

H. 7. 7. b.

[2. Crompt. Pract. 313.

5. Com. Dig. 310. See

Cro. Eliz. 64.]

* The Dean and Chapter of Exeter against Trewinnard, Administrator.

Administrators must pay the intestate's judgment debts before specialties.

Dyer, 32.
4. 30 H. 6. 8. 1.
Dr. and Stud. 77.

Dier, 174. b

Plowd, 15.

5. Co. 28. b.

2. H. 4. 21. Plow.
279.

41. E. 3. Execution, 68.

(53) THE dean and chapter of *Exeter* recovered a debt of two hundred pounds against *William Trewinnard*, and before execution the defendant died intestate, possessed of goods and chattels to the value of one hundred and forty pounds; and administration was committed to *James Trewinnard*, against whom the dean and chapter brought a *scire facias*; and he pleaded *plenè administravit*, &c. and that he had nothing within his hands on the day of the *scire facias* brought, or since; and the plaintiffs averred assets in his hands, upon which they were at issue: and in giving the evidence to the jury the defendant commenced first (Note this, for I believe it is unusual, because he is in the negative, for the conclusion of *plenè administravit* is, "and so nothing within his hands"), and said, that the debtor had no goods besides one hundred and forty pounds at the time of his death, and that he was indebted to such a one in one hundred marks upon condition to pay forty pounds by a bond bearing date after the said judgment given, and that he had paid the forty pounds before the writ purchased against him; and that he was also indebted to another by a similar bond in two hundred marks to pay one hundred pounds, and that he had paid that before the day of the writ purchased, with this averment, *s.* and so he hath fully administered. And the plaintiffs demanded *oyer* of both the bonds, and had it *in hæc verba*: and by them it appeared that the condition of the first was not to pay forty pounds in money, but to deliver certain tin of the value of forty pounds; but the condition of the other bond was to deliver tin or one hundred pounds, in the disjunctive, &c. And upon this evidence the plaintiffs demurred in law. (54) And note, that the said two sums were to be paid at certain days mentioned in the conditions which were passed; and it was not shewn in certain that he made the payments before the days, but it appeared by the shewing of the bonds that they had gotten them out of the hands of the obligees; where-

(55) *Domersal and Asbe's Case*, M. 5. Jac. B.R. judgment was given against the testator, another against the executor; in a *scire facias* upon the last he may not plead the first for two reasons: 1. Judgment does not bind the goods; 2. He might have pleaded the first judgment before. [See 1. Salk. 315. and *Cook v. Jones*, Cowp. 718.]

fore,

fore, &c. And now the plaintiffs prayed judgment upon this matter, because the administrator had paid the said debts before the debt by which the intestate was a debtor of record, which debt of record should be first discharged: and this by the opinion in 21. E. 4. [21. b.] in debt. *Quere.* (55) And see 9. E. 4. [12. a.] in the case of falsifying in debt against executors; and also in 5. H. 7. [27. b.] in the case of a return of the sheriff (after issue found that the executors had assets) that the executors had no goods of the testator, &c. where it is ruled, that if a debt be recovered against the executors who have no more than the debt recovered, and before execution they are impleaded by another, and suffer a recovery, and execution upon that, they shall be charged of their own goods to the first plaintiff, because they might have pleaded the first recovery; for the judgment in that is, that the plaintiff recover his debt of the goods of the testator, &c. so the goods are charged, &c.

[2. Bl. Com. 511.]

4. 5. Co. 59. 28. 20.
H. 7. 5. Plow. 190.
Dier, 32. a. 232. a. B.R.
Execut'. 172. 22. E. 4.
Execut'. 39. Dr. and
Stud. 76, 77. 9. Co.
109. 9. H. 6. 57. 20.
H. 7. Cro. 59. 4 H. 6.
8. Noy, 155.

[See Dougl. 452. 2. Term Rep. 690.]

12. E. 3. Execut'. 74. 85.

(55) *Blanchflower v. Ford*, 29. Eliz. Executor *de son tort demesne* to answer of his own goods, if he satisfy a debt upon the last action before the first, if he hath not sufficient (a).

(a) This seems to be the case reported in 1. Leon. 69. but the point here stated does not appear.

* Lord Willoughby *against* Foster.

* [80. b.]

(56) A LEASE was made by the late Bishop of Lincoln, confirmed by the chapter seal by these words, &c. and "*also the meadows in D. and S. containing ten acres*," and in reality the meadows in D. and S. contained twenty acres: Whether shall the lessee have more than ten acres? And it was thought that he should have the whole.

Lease of all my meadows in D. containing ten acres, when I have twenty in D. all pass.

376. 2. Roll. Ab. 52. 7. H. 4. 41. [1. Term Rep. 704. Shep. Touch. 246, 247.]

1. Leo. 121. 2. 3 Co. 34. 10. 2. E. 4. 28. b. 33. H. 8. 50. b. Plow. 795. a. 191. 169. Dier, 50. b. 87. a. 232. b. Shep. Touch. 246, 247.]

(57) Also a lease of forty-seven acres of meadow near the ditch, of which fifteen lie in D. and twenty in E. and twelve in F. and in truth all lie in F. alone: Whether he shall enjoy the whole forty-seven acres?

Lease of forty-seven acres, fifteen of which are in D. twenty in E. and twelve in F. when in fact all are in F. Whether all shall pass?

12. El. 292. b. 7. H. 4. 41. [Shep. Touch. 246, 247.]

(56) *E. 1. Jac. & Davis v. Frin. B. R.* A. pleaded the lease of a messuage and thirty acres, and the lease was of a messuage and thirty acres in D. be it more or less; this is not good for thirty acres, for it shall be intended that there is a small parcel more, as half an acre, and judgment accordingly.

One devised all lands in the parish of C. called *Hir-land*, where they are in another parish; they pass; but if in C. any parcel be known by that name, then that alone passes.

(58) Also

Whether the grant of the reversion of an office be good?

9. El. 259. a. 30. Aff. 4. 11. Co. 2. b. 3. 6. 8. H. 7. 11. 14. 12. 39. H. 6. 42. b. 11. E. 4. 1. 8. Co. 55. b. 57. a.

[Post. 259. pl. 18.]

If the herbage of a park be granted, and the grantee surcharge so that the deer have no food, Whether the grantor hath any remedy?

11. El. 285. b. 12. H. 8. 2.

By the grant of the office of keeper with three pounds fee of the rents, issues, and profits of a manor by the hands of the receiver, the manor is charged.

9. H. 6. 53. a. 19. E. 4. 3. 2. 9. H. 6. 12. 13. 46. E. 3. 18. b. 22. 29. 41. Aff. 66. 23. 3. 3. Cro. 48.

(58) Also an office of clerk of the courts of the manor of *Stowe* was granted as above to one for term of life; and afterwards he granted the same office to another for term of life, to have and exercise it after the death of the first grantee; and that is likewise confirmed as above: *Quere* as to the second grant? And it seemed that it is not good in the case of a common person, otherwise is it of the king; but some thought that made no difference (a).

(59) Also the herbage agistment and pannage of *Stowe Park* is granted, and the grantee surcharged the park with his cattle, so that the deer had no pasture: *Quere*, What remedy hath the grantor, because he hath made no reservation of pasture for the game?

(60) Also the office of keeper of the said park was granted with a fee of three pounds of the rents, issues, and profits of the manor of *Stowe*, by the hands of the receiver of the said manor: *Quere*, If this grant ought to charge the manor, &c.? And it seemed to the LORD MOUNTAGUE and MR. HALES, *Jussice*, that it should. And afterwards the parties agreed; and LORD WILLOUGHBY gave six hundred pounds for every thing demised and granted.

(58) Note, That it was adjudged in *Stanton and Green's Case*, T. 11. Jac. C. B. [10. Co. 61. a. b.] that such grant of a stewardship in remainder or reversion, or after death, was void; and there also it was cited to have been adjudged accordingly in this case between *Scambler and Waters*, 44. & 45. El. C. B. Rct. 529. [reported in Cro. Eliz. 636, 637.]

The king may grant an office in reversion, but not by the name of reversion; but the subject cannot by any means. By ANDREWS, Reader of *Lincoln's Inn*, August, 1628. 8. H. 7. 12. b. Post. 259. 270. 24. Aff. 4. 3. H. 7. 16.

(a) Such grant is always holden to be good when there is an usage to support it. Hardr. 357. Cro. Car. 49, 50. 279. 557. Sir W. Jon. 311. March. 42. where it is said that upon this difference depended the

opinion of PORHAM in 10. Rep. for there it did not appear that the custom was to grant in reversion. See also Co. Lit. 3. b. and the cases cited in note (5) there.

By a proviso in an act, leases enrolled and sealed within one year before the act passed shall be good; Whether a lease accordingly enrolled a few days before, but the exemption bearing date the first day of the sessions, is within the proviso? *Quere*.

Raft. Monasteries, 11.

(61) A LEASE was made by the Abbot and Convent of *Keinsbam* in the county of *Somerfet*, of the demesnes, &c. and also the rent was diminished, and was made within the year; so that by the act of 31. [H. 8. c. 13.] it is void unless it be aided by the proviso [§ 12.] in the same act, of the allowance of leases in the court of augmentations, the words of which are, "which said leases and grants, &c. have been examined, enrolled, decreed, or affirmed in the said court; and the decrees of the same put in writing,

"writing, sealed with the seal of the said court, shall be good
"and effectual according to the same decree, any clause in this
"act, &c." And the said lease was exhibited in the court
aforesaid on the twenty-fifth day of April in the thirty-first
year to be allowed, and it was so, and exemplified; but the
exemplification bore date the twenty-eighth day of April, and
that was the first day of the parliament. *Quare*, Whether
this lease now be not out of the proviso of the said statute,
because the writing and seal were not made before the par-
liament commenced? But clearly if it had been tested the
twenty-seventh day, it had been good and within the proviso.

7. Co. 15.
14. Eliz. Dalison, pl. 8.
Plowd. 79. b.

* Luson's Case.

(62) **L**USON brought an action of debt against one K.

as son and heir, and declared upon a bond made by
his father, by which he bound himself and his heirs; and the
defendant was condemned by *nihil dicit*; and now the plain-
tiff is to have execution: and by the opinion of all the
Justices of the Bench, the plaintiff shall not have a *capias*
ad satisfaciendum, because it is not his own debt, nor *elegit* of
other lands than of those descended in fee-simple, and no
goods and chattels, so that in this case the *elegit* must be
special. And it was asked, Whether the *elegit* should be *de*
medietate, &c.? and, Whether it should refer to the day
of the judgment, or to the day of the writ purchased?

(63) See *E. 5. Ed. 6. Rot. 510.* A special judgment, *s.*
that the plaintiff should recover the debt of the lands and
tenement which were of the aforesaid ancestor in fee-simple
at the time of his death, being in the hands of the defendant;

* [81. a.]

In an action on the bond
of the ancestor and judg-
ment by *nihil dicit*, the
plaintiff shall not have
a *ca. sa.* against the heir,
but only a *special elegit* of
lands descended in fee
simple.

2. Roll. Ab. 70, 71.

Finch, 76.

7. H. 6. 45. b. 42.
E. 3. 11. a. 3. Co.
15. a. Plow. 440. a.
cont'. 17. El. 344. b.
4. Mar. 149. a. Poph.
151. 1. Keb. 173. 10.
El. 271. a. 1. Inst.
102. b. 10. H. 7. 8.
5. Co. 60. 6. Co. 47.
3. Co. 12. a. 23. El.
373. b.

[See Cro. Eliz. 692.
2. Lord Raym. 786. 3.
Com. Dig. 213. 3. Bac.
Ab. 30, 31.]

(64) *Bowyer and River's Case, H. 1. Car.* [3. Bulst. 317. Poph. 153.] adjudged, that
upon *nihil dicit* all the land shall be charged. 7. 39. Aff. 18. So in Plow. Com. 438. *Davy*
and Pepsys Case. Barker v. Borne, Moore, 521.

Debt brought against the heir, and judgment given upon *non sum informatus*, his body
shall not be in execution; for it is not his debt, although the writ be in the *debet* and *detinet*,
for there is none other form. *East. 41. Eliz. Mr. Mason's Rep.*

(65) If he be charged as heir only, the land descended is solely liable, and in that case
the party may have execution of all the land at common law. 3. 6. Co. 12. 47. But if by
his own default it become his own debt, as appears in Plow. 440. the plaintiff may have
an *elegit* of all his lands whatever.

21. E. 3. 9. In debt, post. 344. pl. 1. Plowd. Com. 440. if he do not plead a false plea,
only the land descended shall be charged; but if he plead a false plea, or is condemned by a
nihil dicit, &c. the plaintiff shall have an *elegit* of all; otherwise it is if he plead a false
plea in *scire facias* upon a judgment or recognizance of his ancestor. [See 3. Bac. Ab.
30, 31.]

but this was upon confession. And note, the writ of execution was special also, s. a recital of the judgment *ut supra*, and that execution thereof remained to be made; therefore it was commanded to the sheriff to enquire by the oath of good and lawful men what lands and tenements the ancestor had at the day of his death, and whether he died seised thereof in fee-simple, and their annual value; and if the sheriff should find that he died seised in fee-simple of any lands and tenements, then that they should be delivered at their just value to the plaintiff, to hold to him until the debt and damages are levied, &c. Witness *Edmond Montague*, the fourth day of *May*, in the 6th of *Edw. 6th*, in the office of *Mr. Rokwood (a)*.

(a) Now by 3. & 4. *W. & M. c. 14. § 6.* If judgment be given against any heir (in an action on the bond of his ancestor) by confession of the action without confessing the assets descended, or upon demurrer or

nihil dicit, it shall be for the debt and damages, without any writ to enquire of the lands, tenements, or hereditaments so descended. *Carth. 354. Bul. Ni. Pri. 175, 176.*

Between the King and Lord Dacres for the College of Graystocke.

The college of Graystock, having a master, but presentable, 6 priests with stipends, and though always called so, having no common seal, is not a college within statute 1. E. 6. c. 14.

[*Jenk. Cent. 5. c. 35. S. C.*]

4. Co. 107. b. *Sty. 52.*

[10 Co. 34. *Lit. Rep. 108.*]

44. Aff. 9. *Dier, 267. 2. H. 7. 15.*

(64) 1st. BY the statute of the present king 1. c. 14. all manner of colleges are given to the king. Also to prove this to be a college, there had been six priests besides the master continually resident at *Graystocke*, and each of these had five marks *per ann.* besides their bed and a room, and the master forty pounds *per ann.* Also it is certified, in the Book of First-Fruits and Tenth, "*Relatoria et Collegium de Graystocke.*" Also it was founded by *Pope Urban* at the request of *Ralph Baron of Graystocke*, ancestor to *Lord Dacres*. It hath also always been called a college. And on the other side it was alleged, that it is not a college, because the master is presentable, and hath admission and institution from the bishop, and is not elected. Besides, they never had a common seal. This corporation is also null, unless it had a legal commencement. And so the opinion of the Judges (*HALES, Justice*, only excepted) was, that the king was not entitled to the college by the act.

(64) 30. *Eliz. C. B. Johnson's Case* [*Goldsb. 93. pl. 7.*], That it hath been often ruled upon the statute 1. E. 6. [c. 14.] that chantries in reputation are given by the same statute to the king as well as chantries in foundation,

* Aylife against Platt,

(65) SIR JOHN AYLIFE, Knight, sued an attaint in London upon the new statute made in 23. H. 8.

[c. 3.] and proceſs was continued upon this ſtatute, and the ſtatute [37. H. 8. c. 5.] for the citizens of London, that they ſhould be jurors of the grand jury, if they were worth each of them four hundred marks in effects; and that they ſhould not be compellable nor diſtrainable to appear out of London. And this attaint was brought in the common pleas (Note this well, for it was much doubted).

And the firſt judgment was given in the exchequer for Platt againſt the plaintiff in the attaint, and before execution the record was removed into the Bench by *certiorari* at the ſuit of *John Aylife*; and pending the attaint the firſt plaintiff prayed a *ſcire facias* in the Bench to have execution of the judgment, and had it by the Judges. *Quod nota*; for attaint is not a *ſuperſedeas*, nor does any *ſuperſedeas* lie as in the caſe of error: ſo note the diverſity 5. H. 7. [22. b.]

(66) And note beſides, upon the writ of re-ſummons againſt the grand jury and the party, and alſo againſt the petit jury, directed to the ſheriffs of London, returnable xv. *Pascha*, they returned the writ ſerved againſt the defendant and the petit jury, but againſt the grand jury they returned the entire ſtatute aforeſaid *de verbo in verbum* in *Engliſh*; and further, that both juries were citizens; and concluded, that they could not further execute the writ againſt the grand jury by reaſon of the aforeſaid ſtatute, without a violation of the aforeſaid ſtatute, &c. But by the opinion of the Court afterwards this return of the ſtatute was omitted. And note, upon the re-ſummons returned ſerved into the Bench at *Weſtmiſter*, a twenty *tales* was awarded. Note this, and *quere*. And the *diſtringas jurat* was returnable before the Juſtices of the Bench in *Guildhall, London*, on the morrow of the *Holy Trinity*, at which day at noon all the Judges of the Bench were in the mayor's court in the *Guildhall*, and there charged the grand jury; and the evidence laſted till

In attaint in London. upon 23 H. 8. c. 3. the ſheriff to the re-ſummons returned the party and petit jury ſerved; but as to the grand jury, returned the ſtatute 37. H. 8. c. 5. and that both juries were Londoners: the Court ordered the ſtatute to be ſtruck out of the return, and made the *diſtringas* returnable in London.

Pending an attaint execution may be ſued out upon the original judgment.

[3. Bac. Ab. 281.]

Co. Lit. 294. b. Raſt.

Attaint, fol. 30. N. B.

242. & 246. F.

[2. Bl. Rep. 1183. i.

Term Rep. 270. 3.

Term Rep. 390. Skin.

422. Sed vide Fitz. N. B.

540.]

8. El. 250. a. Dier, 201.

Hil. 25. El. B. R. York

and Allen, that execution

may be awarded.

3. Cro. 371.

Dy. 19. b. 50. 179. a.

245. a. 5. H. 7. 22. b.

Plow. 49. b. 16. Aff.

4. 22. 33. H. 6. 41. b.

20. & 50. 6. H. 7. 16.

Br. Superſed. 24.

33. H. 8. B. 196. Dier,

193. a.

1.

Raſt. Attaint, 18.

(66) *M. 5. Car. B. R.* A verdict was given in *C. B.* againſt the direction of the Court, and afterwards, upon a new ejection in *B. R.* a verdict was given for the ſame party againſt the direction of the Court; and therefore the party againſt whom, &c. brought attaint; and although that is no *ſuperſedeas* of the firſt judgment, yet the Court ſtayed execution until the attaint might be proſecuted.

nine o'clock at night; and they found that they had taken a false oath; but no judgment was given, for it was continued for a long time by a *Cur' adv' vult*.

Barrington against Potter and Others, Executors.

Debt against executors for rent accrued after testator's death in the *debet* and *detinet*; plea, an eviction of part of the land in the testator's life-time, and a tender of the rent for the remainder in shillings; and demurrer, because the shillings before bringing the action were lowered by proclamation to the value of sixpence only. See Davis, 73.

[Bul. Ni. Pri. 169. 177. 3. Bac. Ab. 23. 5. Com. Dig. 201.]
5. Co. 31. 10. 15. H. 7.

(67) ELIZ. BARRINGTON brought debt for forty marks in the *debet* and *detinet* against Potter and others, as executors of one John Potter; and counted upon a demise made by her to the testator of one manor and one tenement called R. on the 28th day of November, in the thirty-first year of H. 8. &c. for the term of twenty-one years, rendering annually thirteen pounds six shillings and eightpence at two Feasts, &c. by virtue whereof the lessee entered and was possessed; and being so possessed thereof, on the twelfth day of May, in the thirty-seventh year of H. 8. at C. made his will, &c. and then and there died; after whose death the executors entered, &c. and for the rent of two years ended on the Feast-day of Saint Michael the

(67) Entered H. 22. Jac. Rot. 1094. E. 1. Car. B. R. Ward v. Kidswin [Palm. 407. Latch. 7.], upon *detinet* for Hamborough money, and exception taken, because the action was brought for money in the *detinet* only; and resolved by all the Judges that it was well brought, for it is not current here, or of any value; and therefore the action is all one as for a box, or an horse, or a piece of plate; and JONES doubted whether it could be good if in the *debet* only.

Reg. fol. 139. b. In a writ for chattels the action ought to be in the *detinet*, 46. E. 3. 15. a. *Ad valentiam* ought to be omitted in a count for the taking of English silver.

H. 43. Eliz. B. R. Rot. 503. [Cro. Eliz. 840.] Spark, as administratrix of William Spark her husband, brought debt for rent against Nicholas Spark, and demanded twenty-five pounds ten shillings which he unjustly detained from her, with the arrears incurred in her own time; and it was agreed by the Judges to be well brought, 19. H. 8. 8. 11. H. 6. 36. 20. H. 6. 4.; and the reason was, because the original cause commenced in the testator. Hargrave's Case, 5. Co. 31. was afterwards reversed in the exchequer chamber. So also it was adjudged M. 7. Car. B. R. by JONES, WHITELOCK, and CROOKE.

Entered E. 44. Eliz. Rot. 517. adjudged T. 3. Jac. Hale and Diaper's Case [Draper v. Rasfal, Yelv. 80. Cro. Jac. 88.], An action was brought in the *debet* and *detinet* for ninety-nine shillings English, and declared of a sale for sixty-six Flemish, and averment that it was all one, and he recovered. 34. H. 6. 12. 9. E. 4. 5. [49. a.] 6. E. 3. [40. a.] tit. Account, 2. 38. Eliz. Between Bradshaw and Pain [Cro. Eliz. 536.], Debt was brought in the *detinet* for foreign money, and because the judgment was not conditional it was reversed. T. 15. Car. B. R. Rot. 1057. Reynolds v. Lancaster [Cro. Jac. 545.]. Lancaster, as executor, recovered upon a bond against Sidley; the defendant was in execution, and the marshal suffered him to escape, upon which the executor brought debt against the marshal, and declared in the *debet* and *detinet*; and in arrest of judgment it was assigned by the marshal for error, that the action should have been in the *detinet* only.

The judgment in Hargrave's Case was afterwards reversed in Cam. Seacc. by all the Judges, because it was not in the *detinet* only, as 10. H. 7. 5. b. it was agreed to be, which case was denied to be good law. M. 17. Jac. Lord Rich and Frank's Case [Cro. Jac. 238. 1. Brownl. 22.].

T. 18. Car. C. B. by JERMIN, Serjeant, this judgment in the exchequer was cited, and Hargrave's Case denied to be law, in a case between Smith and Northfolk, which commenced M. 7. Car. B. R. [Cro. Car. 225.]

Archangel, in the second year of the present king, an action accrued, &c. The defendants pleaded, that the plaintiff was seised in fee of the said manor by a good and legal title, and of the said tenement called *R.* by a disseisin made of one *B.*; and so being seised, on the said twenty-eighth day of *November*, in the thirty-first year aforesaid, demised the manor and tenement aforesaid to the said testator as above, rendering therefore annually thirteen pounds six shillings and eightpence, *s.* for the aforesaid tenement clear twenty shillings, and for the said manor twelve pounds six shillings and eightpence, at the Feasts aforesaid; and that afterwards, *s.* on the thirteenth day of *June*, in the thirty-seventh year, the said *B.* the disseisee, entered into the tenement upon the possession of the said testator, and was seised thereof in his demesne as of fee, and expelled him thence; after which expulsion he made his will and died, &c. And they further said, that the executors entered into the said manor as above. And they further shewed, as to the said manor, that they were ready and offered to pay to the aforesaid plaintiff, at the Feast of the *Annunciation*, &c. in the first year of the present king, for the rent of one half-year then due, six pounds three shillings and fourpence in pieces of *English* money called *shillings*, each piece being called a shilling then payable within this kingdom for twelvecpence; but that neither the aforesaid plaintiff, nor any other for him, was then and there ready to receive the said six pounds three shillings and fourpence. And the like plea they pleaded to the other three quarters of the said rent, &c. and concluded, &c. *which said twenty-four pounds thirteen shillings and fourpence, in the pieces aforesaid called shillings, after the rate of twelvecpence for each piece called a shilling, for the said two years, the said defendants say that they, on the said Feasts, at and on each of them, at the manor aforesaid, were ready, and they still are ready here in court, to pay to the aforesaid plaintiff according to the rate aforesaid. And this, &c.* And to this plea the plaintiff demurred in law. See *post. fol.* [83. a.] for this matter. And afterwards in next *Hilary* Term the parties agreed; and the plaintiff took the money at the rate aforesaid, without any costs or damages on the one part or the other.

53. 19. H. 8. 3. N. B.
119. M.
Sty. 80. 1. Bullst. 22,
23. Hutt. 79.
Post. 309. a.

3. Cro. 772. 1. Inst.
148. b.

24. H. 8. 5. a. 14. H. 8.
11, 12. 9. E. 4. 1.
Dier, 56. a. 3. Co. 22.

2. Inst. 575.

Davis, 27.

30. Aff. 11.

[5. Bac. Ab. 5. & 6.
20. Vin. Ab. 177, 178.]

Easter Term, 29. Edw. 1. fol. 24. in Bidwel's Book, in the custody of LORD MOUNTAGUE; but not found in my Book of Pleas of that year.

Pong against John de Lindsay and Others.

If, at the time appointed for payment, a base money be current in lieu of sterling, tender at the time and place of that base money is good, and the creditor can recover no other.

[Davis, 69. 72, 73, 74-5. Bac. Ab. 5, 6. 20. Vin. Ab. 177, 178. and see 5. Term Rep. 87, 88.]

30. Aff. 11.

Post. 310.

* [82. b.]

Davis, 28. b. 25.

5. Co. 114.

(69) *JOHN de Lindsay of Luffewicke, John Magge de L. William Walrans de Thrapston, William de Drayton*, and others, were summoned to answer *Elias Pong*, Clerk, of a plea that each of them render to him twenty-four pounds ten shillings, which they owe to, and unjustly detain from him: and thereupon the said *Elias* by his attorney says, that the aforesaid *John* and the others, on *Thursday* next after the morrow of *Saint Martin*, in the twenty-seventh year of the present king, at *Slipton*, acknowledged themselves to be bound, s. each of them in the whole to the aforesaid *Elias* in the said sum of twenty-four pounds ten shillings, and that they would render to him one moiety * at the Feast of the Purification of the Blessed Virgin then next coming, and the other moiety in the middle of *Lent* next following; yet the said *John* and the others aforesaid unjustly detain the debt from him, and refuse to pay it; wherefore he says that he is injured, and hath damage to the value of ten pounds, and therefore he brings suit, &c. and he brings into court a certain writing which evidenceth the said debt in form aforesaid, under the name of the said *John* and the others, &c.

(70) And *John* and the others, by their attorney, come and well acknowledge the said writing to be their deed, but say that at the time of payment of the aforesaid money at the time aforesaid to be made, certain money was current in *England* in the place of sterlings which were called pollards, s. two pollards for one sterling; and that they at the aforesaid times offered to pay to the aforesaid *Elias* a moiety of the said debt in pollards, which the said *Elias* refused to receive, and they bring here into court the said pollards to be paid, &c. and this they are ready to verify *per patriam*; and they pray judgment, &c.

(71) And the aforesaid *Elias* doth not deny this; but because the aforesaid defendants do not deny but that the said debt is in arrear, it is

(70) *E. 28. E. 1. Rot. 11. B. R.* At that time pollards were current in the stead of sterling money, s. each for a penny. *MR. NOV.*

considered

considered that the said *Elias* should recover the aforesaid debt, &c. to be received of the aforesaid *John* and the others, the said moiety of the debt aforesaid in pollards, s. two pollards to be computed for one penny, because it was the default of *Elias* himself that he was not satisfied before of that moiety, &c. and the other moiety, s. twelve pounds five shillings of sterling money, and his damages which had been taxed at six marks by the Judges, and the said *John* and others in mercy. And be it known that the aforesaid writing is cancelled, &c.

(71) 11. H. 7. 5. b. One is to pay at such a day five quarters of wheat; at the day of the contract they were worth fifty pounds, at the day of payment five pounds. The judgment shall be, that he recover five quarters of wheat or five pounds. And the defendant may deliver the wheat if he please; but the sum of money ought of necessity to be referred to the day; for if twenty pounds are to be paid, they cannot be paid but as they are at the time, for money is its own measure; otherwise it is of corn. [Vide a. Vern. 394. Prec. in Ch. 533. 1. P. Wms. 570.]

(72) A MAN is indebted by specialty or upon his accounts settled, and tenders the money to his creditor after the day on which it is due and payable, and it is refused, and afterwards the money is debased; Who shall bear the loss of it? *Quere*; for many thought that the debtor shall bear the loss, although he had made the tender on the very day of payment; because he must say *uncorrupt*, &c.

(72) This case differs from the case above; pl. 70. for here was a default in the obligor or debtor, because he did not make the tender at the day, for after the day the debtor or obligee is not bound to accept the money.

(73) *IMPRIMIS*, A receiver-general or treasurer having a warrant dormant, or being appointed by statute, as the receiver-general* of the court of wards, to deliver annually from his receipt or treasury by a certain day to the cofferer of the king's household, and having a large sum of money in his hands of the king's revenue, after the day that it ought to have been delivered, the coin is debased on the 9th of July in the 5th year, and 17th of August in the same year; Whether the receiver or treasurer in the said case shall be allowed for the loss, or not?

(74) Also, If the receiver had made a tender of his receipt

Tender of money after the day, and refusal, upon an after debasement of the coin the debtor shall bear the loss.

Davis, 27. Dier. 82. b. 9. E. 4. 49. a. 309 Aff. 11.

[Davis, 72, 73. and 5. Bac. Ab. 5. cont. See 5. Term Rep. 87, 88.]

* [83. a.]

If a receiver do not pay over to the cofferer at the day on which he ought, and the coin be debased afterwards, but before he pays, who shall bear the loss?

If he offer, and the cofferer refuse to accept it, who shall bear the loss upon such debasement? If a receiver, having money in his hands, refuse to pay it when requested, who shall bear it?

Davis, 20. b. 21. a.
[Davis, 72, 73. 5. Bac.
Ab. 5.]

§ Co. 83.

before the said debasing, and that had been refused by the cofferer, *quare*, if he shall not be allowed for the debasement? (75) Also, a treasurer having received large sums of money into his custody, places and converts the king's money to his own use, and being required to make delivery of the said money for the king before the debasement, did not pay it; *quare*, Whether he shall bear the loss of it?

(75) 4. *Elix.* by DIER and WESTON, *Justices*, If one is to pay money to another upon request, being collector or receiver, and have it in his hands, and before request it is debased, he shall not suffer the loss.

Roberthon et Uxor against Norroy, King at Arms.

If judgment against the third person on a foreign attachment in London be not executed, the plaintiff may resort back to his principal debtor, and he may sue the garnishee notwithstanding the judgment.

Dier, 106. 247. a. 22.
35. H. 6. 47. 27. 1.
Rol. Ab. 554. 2. Rol.
Ab. 580.

[1. Rol. Rep. 105.]
Cro. Jac. 549. 21. E.
4. 67. a. 22. E. 4. 30.

[Laws and Customs of
London, 132. 1. Salk.
280. 1. Bac. Ab. 692.
Bohun's Priv. Lond.
280.]

(76) **M**EMORANDUM, That upon a matter in dispute between *Mr. Roberthon* and his wife, and NORROY, *King at Arms*, R. BROOKE, *Serjeant of the Law*, recorder of *London*, certified in writing, That if a man sue another before the mayor, &c. and a third person is indebted to the defendant in as much as the suit of the plaintiff is for, and by the custom of the law of attachment the third person is condemned and judgment given against him, notwithstanding the judgment, if no execution be sued out against the third person, the plaintiff may resort back to have judgment and execution against the defendant, who is his principal debtor; and he may also sue the third person for his debt, notwithstanding the judgment unexecuted, &c.

(76) Foreign attachment of debt cannot be before the day be come. *E. 27. Elix. B. R.* & *Sipwith's* case, and *M. 12. and 13. Elix. Rot. 1640. accordant.* And in & *Sir Robert Manwood*, Chief Baron's case, it was agreed that debt upon recognizance may be attached; but 31. *Elix.* & *Gurle's* case, holden that a debt upon a statute merchant cannot be attached. [And see 4. Term Rep. 312, 313.]

Debt is not attachable *pendente placito*, twice ruled. *Babington's* case [Cro. Eliz. 257. 3. Leon. 232.] *M. 31. and 32. Elix. and T. 41. Elix. in C. B.* and there cited in the judgment. *E. 43. Elix. C. B. Rot. 2421. & Powel and Mallow v. Davies of Bristol.* [See 2. Bac. Ab. 691. and Laws and Privileges of London, sec. 9.]

Easter Term,

7. Edw. 6. A. D. 1553.

The Dean and Chapter of Bristol *against* Clerke.

The Serjeants' Cafe.

(77) **T**HE cafe of the new Serjeants was, that affize was brought by the dean and chapter of *Bristol* against one *Clerke* for a portion of tithes in *North Cerney* in the county of *Gloucester*, in which divers exceptions were taken to the writ, and to the plaint which comprehended the title of the plaintiff, upon which was a demurrer in law. The first was, because the writ was of *freehold* where it should be of a *portion of tithes*. Also, that the writ ought to have been brought as well against the tenant of the land as against the disseisor, as in affize of rent charge. But see statute 32. H. 8. c. 7. which answers this exception. Also, for that the plaint is uncertain, s. "of a certain portion of tithes of sheaves of corn, hay, wool, and lambs, annually arising, renewing, and growing of and in two hundred acres of land, twenty acres of meadow, and one hundred acres of pasture, with the appurtenances, in North Cerney." Also, that the statute 32. H. 8. c. 7. which gives temporal actions for tithes and spiritual profits ought of necessity to be recited in the plaint. Also, for that the form of pleading *, which was, s. of a portion of tithes, &c. in his demesne as of fee, is not good; for tithes are not in demesne any more than an advowson. Also, that the title was double, because it is alleged that one I. late prior of S. was seised, &c. in fee in right of his church, and that he and all his predecessors were seised, &c. from time immemorial; and so the prescription carries a double face. Also, for that the words in the title, s. by virtue whereof, are uncertain to what thing they shall be referred. Also it is alleged that king H. 8. was seised of the said portion by reason of the suppression of the said late priory, which was under three hundred marks in his demesne as of fee, without saying in right of his crown, and in fact by the act of suppression, in 27. H. 8. (which is not printed) [it is now c. 28.] the possessions of such little

Affize of a portion of tithes by a dean and chapter, and demurrer thereto; because,

1. The writ was *de liberis tenementis*.

2. The terre-tenant was not joined with the disseisor in the writ.

3. A plaint of "a certain portion," &c. is uncertain.

4. The statute 32. H. 8. c. 7. is not set out.

5. The writ was of tithes in *demesne* as of fee.

6. For that the title was pleaded double, s. that I. late prior, &c. was seised, &c. in right of his church; and that he and all his predecessors were seised, &c. from time, &c.

7. It is uncertain to what the words "by virtue whereof" in the title refer.

* [83. b.]

8. The king is not stated to be seised of the tithes in right of his crown.

9. The christian name of the dean is omitted.

10. For that the tithes in suit are not averred to be parcel of the demesnes of the archbishop of York, late in the tenure of E. T. as they were described in the king's grant of them.

Co. Litt. 159. a.

Dy. 116. b.

a. 11. Co. 44. 25.

Lit. 3. a.

Plow. 105.

abbies

Rol. Contin. 150.

2. 3. Co. 33.

10. Jac. Cro. 680.

11. Co. 69. b.

78. b. 84. b.

Plow. 538.

Dier, 273.

2. Inst. 641.

[Cro. Eliz. 607. 844.

5. Bac. Ab. 95.]

7. H. 7. 2. 27. H. 8. 3.

Answer to 1. Obj.

In an assize for tithes, the writ shall be *de libero tenemento*, and the plaint and title therein shall be special.

[1. Com. Dig. 408. 4. Burr 2418. 3. Willf. 61. 147. 2. Black. 722.]

Litt. 14. Dier, 8.

* [84. a.]

abbies and monasteries are annexed to the crown. Also in the conveyance of the said portion of tithes by the grant of king *H. 8.* to the said dean and chapter, the christian name of the said dean is omitted. Also it is alleged that the said king *H. 8.* gave and granted the aforesaid portion of tithes *inter alia* by the name of the entire portion of tithes arising, &c. out of the *demefne lands of the archbishop of York*, lying and being in *North C.* in the said county of *G.* called the late monastery, now appertaining, &c. and *then, or lately being in the tenure of E. Tame, Knight, &c.* and there is no averment in fact that the lands put in view of which, &c. were *demefne lands of the archbishop, and in the tenure of E. Tame.* And this was the most doubtful and material exception, by the Judges. Also, the matter in law is, Whether the dean and chapter, being a body politic, of whom the statute makes no mention, oniy of a person or persons, be within the benefit of the statute? and also, Whether the tithes in their hands, being spiritual persons, can be demanded in the temporal courts, as lay or temporal things, or not? and, Whether the tithes, by the statute of 27. [*H. 8. c. 28.*] (which is the statute of this suppression) or by the 32. [*H. 8. c. 7.*] are made lay or temporal by any words in the said statutes?

(78) 1. As to the first exception, it seems that the writ is good; for when a man hath a special remedy at the common law provided for by writ in the Register, which serves only for one case, and for one thing, and afterwards a like remedy is provided by the statute in another case, and for another thing than there was any help for at the common law, the general writ ready framed shall serve in the new case, and the special matter shall be shewn in the count, unless a special writ be expressly provided in the statute; as the writ of *cui in vita* at common law served only upon a discontinuance in which the demise of the husband is supposed by the writ, and by the statute of *Westm. 2. c. 3.* a *cui in vita* is given upon a recovery by defendant, and no form of writ there framed, wherefore the common writ supposing a demise, which is false in fact, shall serve, &c. (79) So divers writs of *præcipe quod reddat* are now by statute against *cestuy que use*, and pignor of the profits, although he is not tenant of the land *: the form of the writ at common law is not altered by that: so the statute of 4. *H. 7.* [*c. 17.*] gives a writ of right of

(78) Note, that assize of tithes did not lie at common law, 21. *H. 7.* 3. b. by ELLIOT.

ward

ward for the heir and land of *cestuy que use* of land holden by knight-service; as if the ancestor had died seised in *demesne*, the writ of ward at the common law shall serve, which supposes that the ancestor held his land by knight-service, which is false, but the special matter shall be declared in the declaration. So the tenant by *elegit* or statute who hath only a term and chattel shall have assize if he be ejected, by the statute, as of freehold, and the form of the writ is of freehold, and not of a term, &c. (80) Then if a general writ shall serve in a new case where the writ in its supposal is false, *a fortiori* the general writ of assize in this case, which is not false but true (for tithes are now at this day made lay and freehold by reason of the said statute), shall well serve. And although the said statute of 32. H. 8. that a man shall have original writs for tithes as the case shall require to be devised and granted in the king's court of chancery, yet if the chancellor think this general form of writ of assize of novel disseisin good without devising a new form, that is well enough in this court; but we have a doctrine, that if a man have a writ framed in the Register for his special case besides the general writ, and he use the general writ for his special case, it shall abate; as in assize of common the writ shall be of common of pasture, and there are no forms of writs of assize except those two, wherefore, &c. And see 7. H. 7. [2. a.] in trespass by the husband and wife of a close broken and his goods taken, and count of a trespass done to the wife while single, that shall abate the writ, &c.

(81) As to the second exception, 1. Whether the tenant of the land shall be named in this case, or not?—it seemed that he needs not, for the words of the statute 32. [H. 8. c. 7. §. 7.] are, “that if any one be disseised, deforced, wronged, or otherwise kept from their lawful inheritance, state, seisin, possession, &c. by any other person or persons claiming, or pretending to have interest or title in or to the same, that then the person so disseised, deforced, wronged, &c. shall have their remedy in the king's temporal courts, &c. as the case shall require, for the recovery, getting, or obtaining, &c. by original writs of *præcipe quod reddat*, assize of novel disseisin, mort d'ancestor, &c. in like manner and form as they should or might do, for lands, tenements, or hereditaments, in such manner to be demanded;” wherefore it is not necessary to name the tenant of the land, as in assize of rent charge

7. H. 7. 12. 2.
22. 28. Aff. 45. 7. 4.
E. 4. 1. N. B. 178,
[Co. Lit. 159. a. and
Mr. Hargrave's note 4.
ad loc.]

R. 542.

2. Co. 44.

11. H. 6. 22.
8. Co. 46.

N. B. 179. b.
Dier, 305.
21. H. 6. 3d. 9. E. 3.
4. 49.

Answer to 2. Obj.

Assize lies of tithes in the hands of the parson without naming the terre-tenant:

[1. Bac. Ab. 162.
Fitz. N. B. note C. in
fol. 411, 412.]

3. Cro. 539.

Dier, 31. N. B. 178.
D. 6. Co. 58. 22.
H. 6. 24.

charge or feck, which are things against common right, &c. (82) And besides, for any thing that is yet shewn, the tenant in affize may be tenant of the land, &c. for he hath demurred in law to the title, and no plea is offered that there is no tenant of the land named in the affize, wherefore it seems that * this point ought not to be argued in this case. It seems also that no man can be tenant or pernor of a tithe but he who takes it; and there is a difference between rent and tithe, for tithe is not issuant out of the land as rent is, nor to be paid by the hands of the tenant, as rent is. See for that, the case 40. E. 3. [24. pl. 25.] that great default is in the tenant if the rent be not paid, and he shall be adjudged a disseisor. Also, note the last proviso in the statute of 32. that against him who refuses or denies to set out his tithes, or detains them, remedy is only given in the ecclesiastical court.

2. Co. 44. 42. E. 3.
23. Sty. 77. 238.

Answer to 3. Obj.

In affize, plaint of a certain portion of tithes is good and certain enough.

[Vaugh. 204. 1. Burr. 624. 1. Bac. Ab. 162.]
26. Aff. 58. 22. H. 6. 10.
8. H. 4. 18. N. B. 2. Co. 169.
Pl. 24. 8. E. 3. 69. B.N. C. 442. 9. H. 4. 45. 14. Aff. 9. 8. 59.
[Bol. Nl. Pr. 121. Cto. Jac. 335.]
8. H. 6. 18. 4. E. 4. 41. 7. 27. 44. E. 3. 257. 78. 1. 9. H. 6. 42. 4. 12. H. 4. 3. 61. 6. 12. H. 7. 15. b. Dier, 62. 2.

(83) "*Of a certain portion of tithes, &c.*" This seems good enough, and cannot be devised any better. And FIRST, It is common learning in the Book of Affize in divers places, that a man needs not use such precision and certainty in the plaint of an affize as in other writs of *præcipe quod reddat*; for in 8. Aff. [1.] wood was put before pasture in a plaint, which is contrary to the order and form of a *præcipe quod reddat*, according to the verse; and a plaint was of the annual rent of one robe, or twenty shillings, in the disjunctive, which would not have been good in a *præcipe quod reddat*; and of a certain piece of land, and that is good in affize without any contents certain. (84) So one brought a plaint in *D.* only, and there were two *D.*'s in the county, and neither of them without an addition, yet the affize and plaint was well enough; and the reason as I understand is, that the judgment in affize differs from other writs, for he

(84) T. 16. Jac. B. R. Land in the parish of *A.* by prescription may be liable to the repairs of the parish-church of *B.* and discharged from the repairs of that of *A.* * *Green's* case.

E. 43. El. B. R. *Sir Miles Lands v. Drury* [Cro. Eliz. 814.], the question in this case was, Whether tithes might be demised by copy of court roll? By ~~Donnerdones~~ they cannot; for although tithes have been immemorially to be paid, yet a parson might claim them before any other until the Council of Lateran, and so their origin as to this church was by those Constitutions, and not by custom. [3. Com. Dig. 79.]

Parochial right in tithes when first with us in practice is uncertain: some refer it to the beginning of Henry the Second, others to the 1st of Edward the First; but against such arbitrary disposition sufficient remedy was not provided till the General Council of Lyons holden under Gregory the Tenth, ann. 1274. It was afterwards esteemed the only *debita solutio* in Wickliff's assertion that tithes were mere arbitrary; and that parishioners might *ad libitum* *faciam eas auferre propter peccata prælatorum* was condemned in the Council of Constance. *Selden's History of Tithes*, fol. 149.

recovers seisin of the thing put in plaint by the view of the recognitors, and it is sufficient if the thing in plaint be so certain and plain that the recognitors can put the plaintiff in possession. And now because this term "*portion of tithes*" is uncertain, and unknown in our law, it is necessary to consider its nature and quality for the ministering of our law now, because it is incorporated and made parcel of the body of our common law. I understand a *portion of tithes* to be where a man hath any profit of tithes within the parish of another parson, or vicar, and its origin was † before the Council of *Lateran*, at which time it was lawful for every one to distribute and pay as he chose his tithes, or any portion thereof, to any church according to his best devotion; and there was no restraint to any church or parish in certain; so by continuance that grew to a right and title, and it was therefore given for prayer, or devotion, &c.

4. Co. 35.
2. Inst. 641.

7. 44. E. 3. 5. 3. 10.
H. 7. 18. 2. Co. 44.
b. 44. Aff. 25. Dr.
Ridley, 136, 137. Selden's Hist. of Tithes,
292.

(85) Then to consider the certainty here, in every word of the plaint is certainty. FIRST, The word "*certain*" is an adjective or relative which expresses a certainty and particularity, and especially in the singular number, unless it be coupled with an adjective or substantive uncertain, as "*a certain person unknown*," and "*of the death of one unknown*, &c." for then it does not make any demonstration; but being joined with a substantive certain, as "*in a certain place called*," it is otherwise; so here "*portion*" is a substantive, and by the * words following, *s. of tithes of sheaves of corn, hay, wool, and lambs*, the kind and quality of the tithes are named and expressed: and here the measure or quantity of tithes cannot be expressed; for although the defendant, in the year of the disseisin committed, took one hundred sheaves of corn, two cart-loads of hay, two stones or pounds of wool, and ten lambs, yet the disseisin is made of the entire tithe, which is a thing uncertain in number, for the goodness and fruitfulness of the year is casual and uncertain, and for that reason it is impossible to limit the portion more certainly. (86) And besides, it is alleged and declared that this portion of tithe is a thing of long conti-

* [85. a.]

11. Co. 25. b.

11. H. 7. 3. 11. E. 3.
Dower, 85. Trespass,
212.

† This assertion, that before the Council of *Lateran*, &c. is to be understood of that *Lateran* Council under Alexander the Third; and so as the canonists will have it meant only of ancient feudal tithes, or of the decretal epistle of Pope Innocent the Third sent to the archbishop of *Canterbury* in King John's time, dated in the *Lateran* church, and so made a Constitution, being also about the *Lateran* Council, from whence we received those canons of pluralities, executions of the three orders. Selden, 295.

[Vide ante, Dy. 62. a.]

14. Aff. 10.

Answer to 4. Obj.

32. H. 8. c. 7. is a general statute, and in assize for tithes need not be recited.

28. H. 8. 27. b. 26.

H. 8. 7. a. 13. E. 4.

8. b. Plow. 85. 231.

4. Co. 76. Dier, 119.

a. 27. b.

[1. Com. Dig. 230.

Bul. Ni. Pr. 4. 224.

Bac. Ab. Statute, L.]

Mor. 531.

[2. Hawk. Pl. Cr. 560, 561.]

27. H. 8. 27. b.

11. H. 4. 41. b.

9. E. 4. 12. Plow. 68.

4. Co. 45. 42. E. 3. 15.

13. E. 4. 8. N. B. 115.

Q.

1. Rol. Ab. 542.

Hob. 48.

24. H. 4. 20. a.

6. H. 7. 5. a.

7. H. 6. 35. b.

22. E. 4. 23. a. Plow. 124.

129. Dier, 289. 40.

E. 3. 31. F. Conu-

sance, 88. per Condition.

nance and antiquity, and in the country there the certainty and quantity is well known, so that the plaintiff may well recover his seisin of this portion of tithes by the view of the recognitors, &c. wherefore, &c. And see *H. 11. H. 4. [40. a. pl. 4.]* In debt—*præcipe quod reddat* a certain portion of land is good by *SKRENE*, and allowed by *HILL* without shewing how much that portion consists of. And besides the statute 32. *H. 8.* is plain, that assize and *præcipe quod reddat* lie for a portion of tithes; wherefore, &c.

(87) The statute of 32. *H. 8.* needs not to be set out; and that for two reasons: 1. Because that statute is general and universal, and runs over the whole kingdom, and concerns every person or persons who have any such spiritual profit: then the Judges of every court are bound chiefly to take notice of this law, inasmuch as it gives them jurisdiction and power to hold plea of that, which, before the statute, the common law took no cognizance of; and such general law is not of necessity to be alleged: and this was ruled in error 37. *H. 6. [15. pl. 5.] sub fine*, in the exchequer chamber. Also in 4. *E. 4. [22. a. b.]* in the case of *Lord Hungerford*, in traverse, and other books: and so it is, when a man is acquitted by a general pardon, by parliament; and he, being arraigned, does not plead it, but puts himself upon trial, and is acquitted; he shall not have conspiracy, for he was not legally acquitted; since the Judges ought to have allowed him his pardon without pleading it. (88) And further, this statute doth not give any new writ or action which was not before as common law; but joins and annexes other things which are to be demanded by writs original at common law; by which they were not demandable before. And therefore it may be well likened to the case of 14. *H. 4. [20. a.]* in maintenance; where the case was, that conuzance of plea was granted to *Bristol* of all pleas; and afterwards, there was an action of debt given by statute for a thing, for which no action of debt lay before; they shall have conuzance of this action, because the same action was before at common law: but if the statute had given a new action which never was before, it is otherwise; so here, &c. And this statute also gives a power and jurisdiction to the temporal courts to hold plea of tithes in these cases: and I never understood, that the plaintiff shall be compelled to shew the power and authority

authority of the Judges and * court in his writ or declaration; but that is for the defendant to allege, and to take exception to the jurisdiction of the court, as well as on account of disability of the person of the plaintiff, and things of that sort: and, for these reasons, I think that he is under no necessity to allege the statute, any more than it hath been usual for the statute of R. 3. [1. c. 1.] to be alleged, when a man pleaded a feoffment of *cestuy que use*; or at this day, if a man plead a feoffment to an use, it is more than is necessary to allege the use, executed by force of the statute of Uses 27. H. 8. [c. 10.] And so at this day, if a man will plead a devise by will, shall he be forced to allege the statute of Wills? It seems clearly he shall not. Wherefore, &c.

Plowd. 376. Dier, 329.
32. H. 8. c. 1. 20. E.
3. 26. b. Litt. pl. 10.
N. B. 30. B.

Answer to 5. Obj.

(89) It seems also, that tithes are *demesne*, for they are tangible and visible; and also the esplees alleged in a writ of right of advowson of the church, or of tithes, are in *prender* of great tithes and small tithes, and in oblations, &c. therefore it is not like a reversion, suit, fealty, or such like, which are not tangible. Wherefore, &c.

Affize of tithes in *demesne* is good.
26. H. 8. 3. Dier, 257.
Plow. 191. 5. 28.
[Syst. of Pleading, 337.]

Answer to 6. Obj.

(90) It seems also, that the prescription doth not make the title double, for the seisin of the portion (only) doth not make a good title in the prior of S. any more than of a rent, or any other thing or profit in the soil or fee of another, which commenced against common right: for, in all these cases, the commencement of it ought of necessity to be alleged by him who is to make title to it, whether he be a privy or stranger thereto; for it is contrary to reason to charge the inheritance or freehold of another, without shewing a substantial foundation for it. Then here admit, that the prior had been seised of this portion, which ought to be intended to be in the parish of which the prior himself was neither parson nor vicar, shall this seisin make him a title to this portion without prescription? I think not: and then the seisin is not material, nor traversable, but only the prescription; for the king cannot make other title to it than the prior himself, who could by no means make out a good title to himself, but by grant or prescription. Wherefore, &c.

In affize for a portion of tithes, demandant prescribes in the prior of S. This is not a double title.

41. E. 3. 27. b. by
Thorpe, 36. H. 6.
Monstrans de Faits, 119.
30. 32. 35. H. 6. 8. 15.
7. 13. H. 7. 19. 4. 9.
E. 4. 1. 11.
[3. Vin. Ab. 209.]

(91) Besides, the prescription declares the manner in which the prior was seised, *s. from time immemorial*; and there, this only is traversable, and not the seisin, for he cannot allege the prescription if he do not allege the seisin also: as in a

Plow. 140. 1. H. 5.
15. 4 H. 7. 19.

scire facias to execute a fine, the seisin of his ancestor with a feoffment is not double, for he cannot allege the one without the other; so here, &c.

Answer to 7. Obj.

* [86. a.]

(92) "*By virtue whereof.*" It seems that these words should, of necessity, be referred to all the mean degrees and steps before expressed, by which the said portion is conveyed to the possession of the king; of which, the first degree is the seisin of the prior by prescription; the second, the suppression of the priory by act of parliament in 27. * with the averment that it was under the value of two hundred pounds *per ann.* and also one of the three orders or habits of religion, *s. monks, canons, and nuns*; the third step is, that the king by the act is deemed and judged in actual and real possession of the portion: and all these matters are degrees and means to induce title to the possession of the king, and no one of them is sufficient to do this without the other, but all together are.

(93) And the nature of these words, "*by virtue whereof,*" is well explained and declared in 7. H. 7. [3, 4.] in trespasses for trees cut and carried away, where it is holden, that the "*by virtue whereof*" *nec auget nec minuit sententiam sed tantum confirmat præmissa*: as if the defendant there pleaded a feoffment of the soil where trees grow made to the plaintiff for the use of a stranger, "*by virtue whereof*" the stranger granted the trees to the defendant, that is bad; for the feoffment to an use did not make the grant good, without averring the continuance of the use until the grant of the trees, which thing is not implied by the "*by virtue whereof,*" wherefore, as I understand it, a better form of pleading could not be devised than was in this case.

Bro. Escape, 41.
Plow. 36.

Plow. 193.

Answer to 8. Obj.

It is sufficient to say in assize for tithes come to the king by the suppression of an abbey, that he is seised thereof *in his demesne as of fee*, without saying, *in right of his crown*.

[Doct. Plac. 287. 19.
Vin. Ab. 319.]

Plow. 105.

Plow. 336. Dier, 45. a.

Dier, 103. a.

Plow. 234.

(94) "*In his demesne as of fee.*" This seems good enough, without saying "*in right of his crown,*" and is the best mode of pleading; for it appears before, by the statute, that the king ought to have the said monasteries, to do with them according to his good pleasure, for the honour of God, and the weal of the kingdom: and then to make the law clear, and without any doubt, this is better pleaded than to say "*in right of his crown,*" for this might create an argument and doubt, whether he could sever it from his crown or not, although it seems sufficiently clear that he might; yet to allege that which is dubious and disputable, when it may well be alleged fully and clearly, would be impolitic in pleading.

pleading. (95) And let us grant also, that it were necessary to allege "*in right of his crown*," still the manner of pleading before is such, that the king necessarily must be seised, as if the act gave it him by intendment, although it is not expressly alleged, for the statute annexed it to the crown. And see *E. 34. H. 6. [34. b.]* in *quare impedit*, this exception over-ruled, where conveyance was made of an advowson of King *Hen. 6.* who came to it by descent, and it was parcel of the possessions of alien priors, which were annexed to the crown by parliament in the time of *Hen. 4th* or *5th*.

(96) It seems that it is not necessary to mention the dean by his name, any more in the conveyance of the title for the portion made to the dean and chapter, than in the original writ of assize. And no one will deny, but when a dean and chapter, who are an entire body politic, are to commence any action, the best way is * to omit the name of the dean, for fear of a change of the dean by death, or otherwise, by which the writ may abate, as is adjudged in *21. E. 4. fol. 19. [15. a. b.]*. And I take a great diversity between where one is sole seised in right of his deanery, and where in common with the chapter; for it may be agreed for law in the first case, that if the dean alone be entitled to an action real, he must call himself by his christian name, that it may appear whether the cause of action commenced in his time, or in the time of his predecessor. (97) As if a disseisin be made to a dean, or an erroneous judgment, or false oath, and he die, his successor shall not have an assize of novel disseisin, but a writ of entry upon disseisin in the *quibus*, or a writ of error, or attain, and name himself, because he was not a party to the judgment; but in the other, *s. where the dean is seised in common with the chapter, there, although he die, still his successor, and the chapter together, shall have assize of novel disseisin, or error, or attain, as the case is, without naming the dean in certain, because the dean is not dead, but hath always continuance. And therefore in 14. H. 7. [31. b.]* it is holden, that a dean and chapter, or a prior and convent, without naming the superior by his proper

Answer to 9. Obj.

Dean and Chapter bringing assize for tithes, need not mention the dean by name.

[1. Com. Dig. 196.]

* [86. b.]

7. 10. E. 3. 4. 11.
4. Co. 65.
18. E. 4. 8. 14. Aff.
8. 1. E. 5. 5. a. 5. 7.
10. 18. 21. 41. E. 3.
13. 4. 16. b. 24. 16.
a. 23. 10. 21. 49. E. 3.
17. 66. a. 14. 2. R. 3.
2. Co. Litt. 652.
8. 22. 32. 33. H. 6.
24. b. 45. 6. a. 29.
1. 12. 18. 21. E. 4.
10. 19. b. 66.
2. H. 4. 2. 13.
B. N. C. 869.
26. Aff. 36.

1. H. 5. 5. a.

12. 15. H. 7. 5. 1.
Plow. 158.

(96) *Hil. 32. El. [1. And. 249.] Carter v. Crumwell*, in *electione firme*, the plaintiff declared upon a lease made by the warden and college of *All Souls in Oxford*, and exception was taken because the christian name of the warden was omitted, and it was adjudged unnecessary; and a difference taken where the corporation consists of one person only, as a bishop, there he should be named; otherwise, if of many, as a dean and chapter, mayor and commonalty.

Pl. 27a. b. 458.

Dier, 106. b. 18. E. 4.
2.

[Gilbert, Ejectm. 60.]

17. E. 3. 17.

* [87. a.]

Answer to 10. Obj.
In assize of tithes,
plaint that king H. 3.
gave them *per nomen* of
those tithes, arising out of
the demesne lands of the
archbishop of York, and
lately in the tenure of T.
It is not necessary to aver
that the lands put in
view were the demesne
lands of the archbishop in
the tenure of T.

4. Co. 35. Dier, 129.

Dier, 292. b. 1. Co. 52.
[Shep. Touch. 246,
247.]

name, granting by their common seal an annuity until promotion to a benefice by the aforesaid dean or prior, their successor may tender a benefice; but if they be named, there the contrary is holden, because the aforesaid dean or prior shall refer only to the dean or prior by name, and to none others. (98) And here the proper name of the corporation and body politic is *the dean and chapter of B. &c.*; and by this name they are enabled to purchase, sue and be sued, and not by any christian name. And also the truth in this case is, that the dean, who was the plaintiff in the assize, was the first dean of this corporation, the commencement of which was only in the 24th of Hen. 8. which is only seven years since the erection; wherefore it can no otherwise be intended but the same dean to whom the first grant was made: and see 13. E. 4. 8. b. holden by CHOKE, that although it is usual to allege the name of the mayor, who is the head of the corporation, yet he had seen such general pleading, without naming the head, adjudged good. And see a good case of that, H. 17. E. 3. [1. b.] of a *scire facias* brought by the successor of a dean and chapter, upon a recovery against an abbot, since dead, without naming the proper name of the dean, but of the abbot; he shewed a diversity between the late abbot and the present abbot, but that cannot be of a dean and chapter.

(99) It seems too, that no averment is necessary; and that for divers reasons: 1st. The plaintiffs, in the premises and * commencement of their title, shew, that the portion of their tithes, now in plaint, is issuant out of two hundred acres of land, &c. in N. whereof the late prior was seised in fee by prescription; and that before any title or seisin in the king; and then they proceed in their title, and convey it by due and legal means to the king; and that the king was seised of that in fee, and so being seised, made a grant to them of the portion aforesaid, by the name, &c. so that the foundation of their title was not of the king only, but they also make conveyance of the king's title, s. from the prior: and then it much varies the case, whether the title have its origin of the king only, for then perchance all the words in the king's grant ought to be verified, and especially when it wants certainty. (100) As where the king granted *all his lands which he had by the attainder of I. S.* if a man would

would convey by such grants, he ought to aver that *I. S. had such lands, &c.* The law is the same in the case of a common person who releases *all his right in all such lands as descend to him of the part of his mother in D.* there ought to be an averment that *the lands, &c. descend of the part of his mother*; for otherwise, the release is void, by reason of the generality and uncertainty, &c. And see this 2. E. 4. fol. ult. And yet in 1. H. 7. [28. b. 29. a.] in assize, it was ruled by all the Judges, that if a feoffment be made by deed of lands by the name of *all the lands which he hath of the gift of such a one*, the tenant ought to plead this feoffment by deed, without taking any averment: as if it were made to him by the name of *I. S.* where his name is also *I. D.* because he may be known by one or the other; otherwise is it of a christian name; but there it is holden, that the best pleading is by the name comprised in the deed: and therefore in 26. Ass. [119. a. pl. 2.] it was ruled in an assize brought in *D.* the tenant pleaded jointenancy of the land in plaint, by a deed of land in *S.*; and that was good enough, without averment that *S.* is an hamlet of *D.* because the vill may have two names, the one true, and the other a nick-name. (101) So when any certainty is in the grant, although there be a superfluous addition in the grant, that is not material, nor shall impair it: as is the case in 20. Ass. [8.] A man made a grant of twenty cart-loads of wood in the wood of *D.* which he had of the gift and grant of his father; the grantee was not driven to shew any writing of the father, because by the premises the soil was sufficiently charged, &c. And so in the case of 9. H. 6. [12.] of an annuity granted by the queen, *percipiend' de magna custumar' of London*, the grant was ruled good, and the *percipiend'* void, &c. And so in 2. E. 4. [29. b.] A man released all his right in *White-acre* in *D.* which he had by *hereditary descent* from his father, although he had it by *purchase or disseisin*, it is well enough, &c. Then here, at the time that the king granted this portion of tithes which * appertained to the said late prior, it may be that the said two hundred acres whereof, &c. were the *demesne of the archbishop of York*; and then the king in-

33. H. 8. 50. b. Pl.
395. a. 191.

Dier, 80. b. 376. 227-
4. H. 6. 1. a. E. 4. 20.
23. b.

Hob. 171. 10. Cā.
113. Pl. 191. b. 192. a.

29. E. 3. 7. 8.

26. Ass. 38. a. Co. 34.
2. Jac. Cro. 48.

9. H. 6. 53. Bro.
Grants, 4. Pl. 191.
194

[Shep. Touch. 75. 245]
246, 247.]
33. H. 8. 50. b.
Plow. 395.

* [87. b.]

(101) Customs and subsidies have been formerly assigned by our kings to their subjects, as H. 6. did to Cardinal Beaufort, ann. 22. for his security for a debt of sixteen hundred pounds due to him, assign over to him the customs of *London* and *Southampton*. So Edward 4. anno 12. secured his debts by assigning over the next subsidy and aid that should be granted from the church or laity. Act. Conf. 22. H. 6. Bill Signat. 12. E. 4.

1. E. 6. c. 8.
 Raft. Patents, 13.
 a. Co. 33. Dier, 129.

Cap. Jac. 6^{to}.

sert d these words in his grant, to make it more certain, and to give another name to the portion which he had before; for before it was known by the name of a portion of tithes in *N.* belonging to the priory of *S.* and by that name it appears that the king in his grant assented; but he added more to that as above, which addition is peradventure false, and perhaps true: and so of the tenure of *E. Tame*. And if neither of them were true, yet by the statute 34. & 35. *H. 8.* c. 21. this mis-recital of late farmer or occupier does not make the patent void. (102) Then if the portion passed by the patent, that sufficeth for the plaintiff; for it would have been folly to take an averment of this title to a thing which was false, and which is immaterial whether false or true, as the case is here. And the counsel of the plaintiff would ill have deserved their fee (of whom I was one), had they alleged this averment of the title in the plaint, which had it been found false, ought to destroy the entire title of the plaintiffs, &c. Wherefore, in my opinion, as it is here pleaded, the portion of tithe is conveyed sufficiently from the prior to the king, and from the king to the plaintiff by name, &c. And the pleading is "*the aforesaid portion,*" which cannot be any new one, or other portion derived from the king; and since the defendant hath demurred in law upon this plaint, he hath acknowledged that the king's grant was of the same portion that issued out of the land put in view, &c. And, therefore, I think the pleading good without averment, &c.

The Case of Merton College, Oxford.

Whether the king or metropolitan shall have the presentation (upon the deprivation of a bishop) to a church devolved to the bishop by lapse?

25. E. 3. 58. a. Quare
 Imp. 29. 5. E. 2.
 Qua. Imp. 165. N. B.
 34. G. 4. H. 6. 1. 25.

(103) **A**T *Ely Place*, before the chancellor of *England*, this case was in question: The master and fellows of *Merton College* in *Oxford* were patrons of a benefice within the bishoprick of *Durham*, and the incumbent died, and the church remained empty for six months; and afterwards, *s.* in the beginning of *Michaelmas Term* last, the

(103) 18. *El.* ruled, that it belongs to the guardian of the spiritualties; and this seems the cause of it, for that it comes by reason of spiritualties. *Quere*, Whether the patron may present now, inasmuch as while the bishop is alive, notwithstanding the lapse, he may always present before collation? When the king takes his title *in aucto droit*, he does not take advantage of any lapse, as appears between *Beverley* and *Cornwal*, [Moore 224. 1. And. 148.] in *quare impedit*, for the church of *Somerby* in *Lincolnshire*. 29. *El.* 7. Co. 28. a.

bishop,

bishop, *s. Cuthbert Tunstall*, was deprived ; Whether the collation belonged to the king, or to the archbishop of York, metropolitan, or not ? *Quære.*

E. 3. 17. The king shall have it. Hob. 154. [See 2. Gibb. Cod. 770. & Watt. Cler. Law, 115.]

(104) **T**HE present king made a lease, by indenture, of the tithe of corn of *D. S.* and *V.* to one for a term of years, reserving an annual rent to be paid at the Feasts of the Annunciation of the Blessed Virgin *Mary*, and *St. Michael* the Archangel, or within one month after any of the said Feasts, in the court of augmentations ; with a proviso, that if the said rent should be arrear by the space of one month after any day of payment before limited (*if it be in due form demanded*), then the lease should be void. Afterwards the king by his letters patent granted * the reversion of the said tithe to one *R. M.* in fee ; the rent is not paid at the next Feast of payment, nor within two months next after the said Feast : *Quære*, Whether the lease be void without any demand made by the patentee ? And where shall the rent be demanded, *s.* at the court of augmentations, or of the person of the lessee ? Also, Whether a tender, by the lessee, of the rent, made at the court of augmentations within the month, be a sufficient tender by the lessee, without other tender at the last instant of the last day of the month ?

Upon rent reserved by the king, payable upon demand at a place certain, on pain of forfeiture, if not paid within one month. Whether a demand is necessary by a grantee of the reversion, and where ? and, Whether a tender after it is due, but within the month, suffice without another tender on the last instant ?

7. E. 3. 68. 5. Co. 3. [88. a.]
4. Mar. 142. 2. Plow. 213. 10. Co. 129. 2. H. 7. 8. b. Plow. 70. 142. 5. Co. 114. 4. Co. 73. 11. Diet. 68. b. 222. 2. 14. H. 8. 9. Co. Litt. 47. 2. 6. H. 7. 3. Noy, 145. [Co. Litt. 201. b. 202. a. 744. 2. Dougl. 486. 2. Mod. 264. 1. Bac. Ab. 417.] [5. Bac. Ab. 8. 9.]

(104) Moore, 598. *Bushin's Case*. Tithes upon lease for years rendering rent at such a place, and for non-payment to be void, it ought to be demanded.

It seems that if the lease be made by the seal of the court of augmentations, the reservation of the rent to that court is but an *expressio eorum quæ tacite insunt*, as is said in *Borough's Case*, 4. Co. 73. b. But if it be by the great seal, it seems otherwise ; and for that, see statute 27. H. 8. c. 27.

T. 17. Jac. & Lady Denney's Case, that rent may be reserved out of tithes. See 4 L. Aff. 51.

Eden and Whally's Case.

(105) **O**NE *Eden* confessed himself guilty of *multiplication*, *s.* That he had practised the making of a *quint-essence* and the *philosopher's stone*, by which all metals

The principal under 5. H. 4. c. 4. being discharged by a general pardon, excepting such

(105) M. 44. & 45. *Elix*. [Moore, 675.] In *Mr. Darcey's* action on the case of monopolized cards, there was cited a commission in the time of H. 6. directed to three friars and two aldermen of London, to enquire whether the philosopher's stone was feasible, who returned that it was, and upon this a patent was made out for them to make it.

as are in the Tower; whether the accessory being in the Tower shall be discharged?

Whether there can be an accessory to a new felony?

Lamb. Just. 279, 280.

Dalt. 280. 284.

Stamf. 47, 48.

7. E. 6. c. 14.

[2. Hawk. Pl. C. 548.

but see 1 Ann. sess. 2.

c. 9. f. 1.]

3. Aff. 14. 3. H. 7.

32. b. 13. E. 4. 3. b.

7. 11. H. 4. 13. 12.

15. E. 3. Coron. 116.

260. 151. 161. 15.

Aff. 7. 4. Co. 43.

19. H. 6. 47. Stamf. Prerog. 44. 3. E. 3. 27. 4. Raft. Felonies, 3. 3. Inst 74;

[2. Hawk. P. C. 444, 445. 1. H. H. P. C. 704.]

might be turned into gold or silver; and also accused *Whally*, now a prisoner in the *Tower*, of urging and procuring him to use and practise this art; and that *Whally* had laid out money in red wine, and other things necessary for the said art. And because this offence is only felony, *Eden*, the principal, was pardoned by the general pardon; but *Whally* who was but accessory in this case was excepted, as one of those who were in the *Tower*. The question was moved, Whether *Whally* should be discharged? *Quære* the statute of 5. H. 4. c. 4. which enacts, that *none should use to multiply gold, or silver, nor use the craft of multiplication; and if any the same do, that he incur the pain of felony in this case (a)*. *Quære*, Whether there can be any accessory in this new felony?

(a) This statute is repealed by 1. W. & M. sess. 1. c. 30.

In assize against several, where one died pending the writ, Whether the plaintiff may abridge his plaint after verdict of that part of which the deceased was tenant?

Dier, 34. 61. 65.

70. 36. H. 6. 22. 28.

3. 11. Co. 1. b. 5. 14.

23. 26. 28. 40. Aff. 8.

16. 63. 38. 15. 7. E.

3. 3. 27. Flo. 90.

Cro. 116. b. 13. E. 3.

F. Presentment, 11.

[Booth's Real Action,

290. 1. Vin. Ab. 110,

311. 1. Com Dig. 34.]

(106) **A**SSIZE of novel disseisin brought against three, and the plaint is of six acres of land. The defendants pleaded *nul tort, nul disseisin, &c.* The recognitors found, that one of the three named, on the day of the writ purchased, was sole tenant of two acres, and shewed them in certain; and that he disseised the plaintiff of one and not of the other; and so of the second; and as to the third, that he, on the day of the writ purchased, was sole tenant of the two remaining acres, and disseised the plaintiff; and that he died pending the writ; and this they shewed in certain. And, after the verdict, the plaintiff abridged his plaint of all that of which no disseisin was found in the hands of the two, and of that part of which the deceased was tenant. *Quære*, Whether the plaintiff shall recover accordingly?

Allington v. Oldcastel et Ux'.

(107) CATHARINE ALLINGTON brought appeal of murder against *W. Oldcastel*, of *B.* in the county of *Somerset*, yeoman, and *Margaret Oldcastel*, of *B.* aforesaid, in the county aforesaid, *spinster*, otherwise called *Margaret O.* the wife of *W. Oldcastel*, &c. *W.* did not come, but *Margaret* appeared * before the exigent returned, *gratis*, by surrendering herself; and now pleaded, that on the day of the writ purchased she was a *gentlewoman*, and not *spinster*, judgment of the writ, and prayed allowance: and over to the felony and murder she pleaded not guilty. And the truth was, that she was daughter to *Sir E. Gorge*, Knight, and also her husband *Oldcastel* was a gentleman, &c. (108) And the plaintiff replying, *protestando* that this addition of gentlewoman † is sufficient addition in law according to the form of the statute of Additions of Names and Surnames [1. H. 5. c. 5.], for plea said, that an exigent was awarded in last *Michaelmas* Term (and shewed the day) against the defendants by name as above, returnable on the morrow of the *Holy Trinity* in this Term; and that the said *Margaret* came in her proper person in last *Hilary* Term, by the name as above, into the King's Bench, and rendered herself *gratis* to the prison of the *Marshalsea*, and found manucaptors, &c. upon which, at the petition of the said † *Margaret*, by writ of *superfedeas* issuing out of that court, &c. it was commanded to the sheriff, &c. that he should superse: and concluded with this averment, "and this she "is ready to verify by the record of the aforesaid writ of "exigent, &c." and prayed judgment, whether against the prosecuting of the said writ of *superfedeas* to the plea aforesaid she ought to be admitted to quash the writ aforesaid, &c. To which plea of estoppel pleaded in manner aforesaid the

An exigent is sued to outlaw a defendant in an appeal, who sues out a *superfedeas* by the name in the writ; he cannot after that plead a misnomer to the original.

Dier, 74.

1. H. 4. 4. b. 14. H. 6. 15. 2. Inst. 668.

[2. Hawk. Pl. C. §69.]

* [88. b.]

L. quinto E. 433.

10. H. 7. 13. a. 22. H. 6. 7. 3. 4. E. 4. 15. Cro. 119. Br. Estoppel, 84.

19. H. 6. 1. 43. 36. 44. 58. F. Estoppel, 39. Cro. 96. a. Stamf. Cor. 95. 2. Inst. 670.

(107) *Sir Henry Ferrers, Bart.* was arrested for a debt by the name of *Henry Ferrers, Knt. and Baronet*, and one of the serjeants was there killed, upon which he was indicted T. 10. Car. in B. R. [Cro. Car. 371.] and resolved by the Court that it was not murder, because the *capias* was mis-awarded. [2. Hawk. Pl. C. 328.]

† Orig. *negl.*

‡ Orig. *ipsum Marise.*

defendant demurred in law ; but afterwards by the advice of the Court waived her demurrer, and pleaded not guilty, &c. [2. Hawk. Pl. C. 243.] And afterwards the parties agreed, and the plaintiff was married pending the plea.

To maintain an appeal it is necessary that the woman should live sole. *Stamf. Prerog.* 59. a. [2. Inst. 68. 2. Hawk. P. C. 243.]

Daves' Case.

Cestuy que use, before the statute of *Uses*, levied a fine to a stranger in fee, who granted it to the king : the feoffee to the use, after the statute, hath no interest, so cannot sue a petition of right to the king to revive the use.

1. Co. 126. a. 135. Plow. 348. Dier, 102. 291.

2. Aff. 11. Br. Fines, 72.

Plow. 353. a. 16. EL. 329. b.

* [89. a.]

1. Co. 128. Post. 274. a.

(109) STEPHEN DAVES was seised in fee of certain land in *Shorn* in *Kent*, and enfeoffed thereof *John Lawrence* and others in fee, in the nineteenth year of *H. 8.* to the use of *Emma* the wife of the feoffor for term of life, remainder to the use of *Richard Daves* his brother in tail, remainder over to one *Beatrice Herbert* in tail, remainder to the right heirs of the said *Stephen* ; and afterwards, in 24. *H. 8.* a fine with proclamations was levied to *Sir Henry Wyat* and others in fee, by the said *Stephen* and his wife, by the name of *Emma* his wife, and by the said *R. D.* the first remainder-man in the use, which said fine was to the use of *Sir Henry Wyat* and his heirs in fee ; and afterwards, in the 32. *H. 8.* *Sir Thomas Wyat*, son and heir of *Sir Henry*, bargained and sold the land to the king by indenture enrolled, in fee ; and afterwards the said *R. D.* died without issue, and afterwards, in 37. *H. 8.* *Emma* died : and in the third year of the present king *John Lawrence*, the survivor of the feoffees, brought a petition of right to the king : and the matter was found by the verdict. (110) And in arrest of judgment it was alleged for the king, that this petition does not lie by *Lawrence* the feoffee for two reasons : one, because the fee-simple of the use was legally given and conveyed to *Sir H. Wyat* by the said *Stephen*, and now is in the king ; and then that is an impediment to the entry of the feoffee to the use in the case of a common person, * because he could not be seised of a fee-simple as he was before the alienation ; and then, Of what estate ought he to be adjudged

(109) Plow. 350. 352. *Dalmerie and Barnard's Case*. This case does not impugn the opinion that *cestuy que use in remainder* cannot grant the fee of the land to the prejudice of *mesme* † estates, &c.

(110) After the statute of 27. *H. 8.* c. 10. no right is saved to the feoffees which they have to any other use ; as is said in 1. Co. 131. a. *Cudleigh's Case*.

† Orig. *mesme*.

in ?

in? And the other reason is, that all interests and rights of feoffees to an use, unless it be to their own use, is taken away by 27. H. B. c. 10. And therefore *quare* thereof.

Clifford v. Warrenner and Others, in Error.

(111) CLIFFORD brought a writ of error in *B. R.* against *Warrenner* and others upon a judgment in *C. B.* in *ejectione firmæ*; and the writ there was for entering into a manor, and carrying off goods and chattels, &c. And the declaration was, that a lease was made for the term of fifty years, the lease to commence at the Feast of *Saint Michael the Archangel* which should next come after the death of one *J. S.* and averred the death of the said *J. S.* after whose death the said lessee for years entered, and was possessed thereof until the defendant *wit force and arms*, &c. And the defendant caded, *bat he did not eject* the plaintiff out of the manor also *esal* it: the appurtenances, in manner and form, &c. Upon which they were at issue: and it was found by the verdict that the defendant *did eject* in manner and form, and they assessed damages; upon which the plaintiff had judgment, that he should recover his aforelaid term and damages, &c. and that the defendant *captiatur*. F. N. B. 220. H. And note, that it appears by the count, that the term of fifty years was not yet expired. And it was assigned for error, that no certainty when the term commenced is in the declaration, for the year of the death of *J. S.* was not al-

Error on a judgment in *ejectione firmæ*: 1. Because the declaration was on a lease to commence at Michaelmas after the death of *J. S.* and plaintiff did not aver the time of the death and entry. 2. Because the writ was for entering a manor *vi et armis*, and seizing goods, and the issue *non ejecit* instead of *non cūd*. 3. Because plaintiff was not amerced for his false claim as to the goods and chattels. And 4. Because judgment was, that the defendant *captiatur pro fine*, though the force and arms were not found.

(111) *M. 3. Jac. C. B.* WALMSLEY took a difference, that if one plead a lease for years made to him, *virtute cuius* he was possessed, it is not good without pleading an entry, which is the means to come as the rightful possession; otherwise of feoffment where livery ought to be intended. Co. Lit. 201. *as accord*.

30. *Eliz. Paul Alexander's Case* [Cro. Eliz. 169.], That debt lies against the termor in this case. It was cited by DAVENPORT in the argument of *Marle and Moody's Case*, *M. 17. Jac. B. R.* so holden 33. *Eliz. & Dance's Case*. [1. Strange, 550.]

M. 44. El. or 42. El. B. R. In *ejectione firmæ* upon a lease made to commence at *Michaelmas*. And the plaintiff declared, that he *by virtue of the lease* had possession of the term. And it was moved in arrest of judgment, that he did not say *that he entered after Michaelmas*. And this Book was cited, and GAWDY and FENNER held it bad; but POPHAM thought it aided by the statute of *Jeofails*, for it is only form, and the demise is the substance. And by POPHAM, after *Michaelmas* he is termor by the continuance of possession; which GAWDY and FENNER denied.

T. 43. Eliz. Ruled in *Douglas's Case* [Cro. Eliz. 766.], where a man declared upon a lease to commence *from the day of the date*, and that he was possessed *by virtue of that* until after such a day that the plaintiff ejected him, and did not aver in fact that he entered after the day of the date (for the lease did not commence until the next day), that judgment should be arrested for that reason, *absente POPHAM*. [See Cowp. 714. Powell on Powers, 433. to 508.]

a. R. 3. 20. b. Litt.
 pl. 429. Co. Lit. 42. a.
 275. b. 276. b. 30. 36.
 H. 6. 6. 28. b. 21.
 E. 4. 50. b. 78. 19.
 H. 6. 22. a. Dier, 97.
 254. 286. 3. H. 4. 3.
 11. H. 7. 12. Fruit de
 Plead, 2. a. Bridgm.
 Rep. 47. 2. Ro. Ab.
 420. Dier, 96. b. 131.
 134. b. 315. a.
 [1. Stra. 550. Cowp. 714.
 Powel on Powers, 433.
 Cro. Eliz. 228. 1. Id.
 Raym. 90. 1. Com.
 Dig. 332.]

8. Co. 59. a. Flo. 199.
 229. N. B. 90. 5. Co.
 59. 33. E. 3. Bro.
 915.

leged, nor whether he died before the Feast of *Michaelmas*, at which Feast the term ought to begin. And it may be intended that the plaintiff entered before the commencement of the term, and then he is a disseisor, and not a termor; and it shall be taken most strongly against him; and then the judgment is erroneous, that he should recover his aforefaid term, where no term appears in certain. Also it was assigned for error, that *he did not eject* is no plea, but he ought to have pleaded *not guilty*, which refers as well to the goods carried away as to the entry into the manor and the ejectment by force and arms. And also the force and arms here is not answered, nor found, and yet judgment is given that the defendant *capiatur pro fine*. And note also, that the plaintiff should have been amerced for his false claim (*a*) as to the goods carried away, of which nothing is found; wherefore, &c. But note, that goods and chattels were not in the writ; therefore, &c.—See more in the next *Hilary Term, post. fol. 96. b.*

(*a*) But now by 16. & 17. *Car. 2. c. 8.* § 1. no judgment *after verdict, &c.* shall be reversed for want of a *misericordia* or *capiatur*, or by reason that a *capiatur* is entered for a *misericordia*, or a *misericordia* entered

where a *capiatur* should have been entered. And by 5. *W. & M. c. 12.* the *capias pro fine* is taken away in all actions of trespass, ejectment, assault, and false imprisonment. See 4. *Com. Dig. 179.*

FINIS EDW. 6.

1. Queen Mary.

Raynolds, Verney, and Others, against Dignam, Lee,
Temple, Woodliff, and Others.

(1) **B**EFORE the statute 27. Hen. 8. [c. 10.] *I. Verney* had feoffees to his own use in fee of divers manors in the counties of *Buckingham, Bedford, and Hertford*, which feoffees at his request executed the estate in possession to the said *I. V.* and *Dorothy* his wife, and to the heirs of their two bodies begotten, remainder to the right heirs of *I. V.* And they had issue *Mary* married to one *Raynolds*, and then *I. V.* died, and *Dorothy* sold the manors in fee to one *Rawlins*. And afterwards, in affirmance of the bargain, a fine was acknowledged by the said *Dorothy* and *Raynolds* and *Mary*, come cco, &c. to the said *Rawlins* and one *Dignam*, and before the certificate and the engrossing of the fine *Mary* died without issue: and notwithstanding this the fine was certified by *SIR HUMPHREY BROWN, Justice*, upon the *dedimus potestatem*, which bore date *March 29*, in the second year of *Edw. 6.* (2) and thereupon engrossed and proclaimed according to the statute. And for the reversal of this fine, and to avoid the alienation by *Dorothy*, by statute 11. Hen. 7. [c. 20.] *Dorothy* and *Raynolds*, who was *Mary's* husband, and one *Ed. Verney* as cousin and collateral heir of the said *Mary*, brought a writ of error in *B. R.* and the writ was directed to the *custas brevium* of the common pleas "to remove the record and process" (without "*aforsaid*"), with every thing thereto relating, which was done accordingly. And the writ was "to the great damage of the said *Raynolds, Dorothy, and Ed. Verney*," and shewed in the writ how cousin and collateral heir to *Mary*. And because *Raynolds* and *Dorothy* did not appear, a *sum. ad seq. simul* was awarded against them, which was returned *nicbil*. However they appeared by attorney, and joined *gratis* with *Ed.* in the suit. *Nota*

If a man settle land to the use of himself in tail, remainder to his own right heirs, and die leaving issue a daughter only, who levies a fine and dies without issue, and *J. S.* bring a writ of error as cousin and collateral heir of the daughter, he shall not reverse the fine.

No averment can be made, that the consor of a fine died before the issue of the *dedimus potestatem*.

In error in *B. R.* to reverse a fine in *C. B.* only a transcript of the fine is removed till the reversal.

5. Co. 39. Dier, 221.

33. H. 6. 52. b. 8.

Eliz. 246. a.

1. Co. 76. b.

Raft. Discont. 2. 1.

Rel. Ab. 747.

29. Aff. 35. 3. H. 6. 2.

10. H. 7. 21. 6. E. 4. 9. b.

(2) *H. 30. Eliz. C. B.* In *Pigor's Case* [Cro. Eliz. 115. 124.], it was adjudged, that if an infant in remainder and lessee for life, join in a fine, the infant alone may bring a writ of error. See Cro. Eliz. 129. [Cruise, Fines, 291.]

7. H. 4. 4. N. B. 21. b.
2. Bulf. 243. 1. Inst.
383. a. Cro. Jac. 12.
359. Cro. Car. 469.
Dier, 258. 220. 274. b.

[Cruise on Fines, 294.
38. 48, 49, 50. Cro.
Eliz. 468. 2. Will. 115.]

[Cruise on Fines, 296.]

44. E. 3. 37. 21. Aff.
10. Plo. 265. 1. H. 7.
20. a. 26. 7. E. 4. 23.
39. H. 6. 4. N. B.
20. G. B. N. C. 495.
F. Error, 76. 83. Bro.
Récord. 79.

[Bac. Ab. Error, (B.)
Cruise on Fines, 290.]

[* 90. a.]

B. N. C. 337.
1. Rol. Ab. 747. Bridg.
Rep. 71. 1. Rol. Rep.
301. 22. E. 4. 31. a.
9. 16. H. 7. 24. b. 9.
N. B. 21. b. 3. H. 4.
20. a. 50. 22. H. 6.
28. b. 8. Co. 43.

[Bac. Ab. Fines, H.]

a. Bulf. 243, 4

[1. Burr. 410.]

3. Co. 4. Dier, 1. b.
Palm. 245.

F. Discant. 5. 149. 37.
Aff. 4. 14. E. 3. 8. b.
40. 42. E. 3. 9. 10. a.

hoc. (3) And first, They assigned error in the death of the said *Mary*, and alleged her death to be on the 25th of *March*, which was before the *teste* of the *dedimus potestatem*, on which day it appears by the certificate of the concord that she was alive, or otherwise the Judge cannot record it. And because this assignment was contrary to the record, and certificate of the Judge, they altered it by the opinion of the Court, and assigned the death generally before the engrossment, entry, and recording of the king's silver; and in shewing that, the whole state of the case is disclosed by the plaintiff in the assignment of error. (4) And as it seems, the writ of error is not good in form, because the transcript of the fine ought to be removed, and not the real record itself, until judgment of reversal be given. And this appears in divers books and precedents, as in 21. E. 3. [24. a.] 40. Lib. Aff. pl. 29. because there is no chirograph in *B. R.* if the fine be affirmed. Also note, the writ of error is brought by *E. V.* as cousin and collateral heir to *Mary*; and it appears that no right had descended to him by *Mary*, because she had but an estate tail, which is determined by her death without issue. And *non constat* that the fee simple was in him as * right heir of *I. V.* his father, for it might be that *I. V.* had issue a son, and another daughter besides *Mary*, for any thing that is shewn to the contrary, for he is never named as heir to his father in any prior showing, and then he is not damnified by this erroneous judgment, as the writ supposes, as right heir of *Mary*, from whom no right is descended. (5) And the writ of error shall be brought by him who should have the thing whereof the judgment was erroneously given, and this is the right heir of *I. V.* And see this in 3. H. 4. [19.] that the issue female in tail special brings a writ of error because she is to have the land back, and not her brother, who was heir general to the ancestor. And see also the like in *H. 10. E. 3. [H. 7. E. 3. pl. 7. sub fine.]* So this judgment is reversible by him in the remainder at common law, or by the equity of the statute 9. R. 2. c. 3. (*quare hoc*) and not by the heir general of *Mary*. And admitting that it shall be intended that *Mary* was right heir to *I. V.* yet because this fee-simple was never executed in her, but was expectant upon the estate tail, he who would demand this fee-simple when the tail is spent, ought to make himself right heir to *I. V.* according to the limitation

limitation of the remainder: for although *Edmund* was of the half blood to *Mary*, yet shall he have this remainder of the fee-simple as right heir to *I. V.* if he be of the whole blood to him; wherefore, &c.

3. Co. 42. a. 24. E. 3.
24. and 30. 3. Co. 37.
7. H. 5. 3. b. 5. E. 3.
52-

Mervyn et Ux' v. Lyds et Ux' Executricem.

(6) **W**ASTE was brought by *Henry Mervyn* and *Editba* his wife against *Edward Lyds* and *Mary* his wife, as executrix of the testament of *John Cowper*. And the writ was, that the said executrix, while sole, &c. did waste, &c. of lands, &c. that the defendants held for a term of years of the aforesaid plaintiffs of the assignment of *E. M.* who was assignee of *Geo. Rytbe* and *Thomas Grantham*, assignees of king *Hen. 8.* assignee of the late abbot and convent of *D.* who made the lease for years to the said *John Cowper*, &c. to the disinheritation of the said *H. Mervyn*, because the fee-simple was in him only. And they counted upon the whole case accordingly; and shewed the deeds and grants with the attornments accordingly, and conveyed the land first to the hands of the said king by the suppression of the said abbey by the statute 27. *H. 8.* [c. 28.] because it was under the value of two hundred pounds *per annum*; and assigned the waste in the lands, *s.* in digging and carrying away the soil, to wit the clay, and in the woods, *s.* in cutting down and selling thirty oaks of the value of two shillings each, and twelve ashes of the value of twelve-pence each, &c. to the damage of the said plaintiffs. The defendants confessed all the conveyances, and the lease accordingly; and as to all wastes, &c. except the cutting and selling of the aforesaid trees, *nullum fec. vass.* &c.; (7) and as to them, *actio non*, because they say that the said *G. Rytbe* and *T. Grantham*, having the reversion in fee-simple, on the first day of *March*, in the first year of king *Edw. 6.* at *H.* &c. bargained and sold to the said *John Cowper* in his life-time, all those their woods and trees then * growing in and upon the said lands in form aforesaid demised, to the said *I. C.* which then might reasonably be spared; and that afterwards, *s.* in the fourth year of *Edw. 6.* then next

Waste by the assignee of the reversioner (who claimed under the original lessor) for cutting and selling trees. Plea, that the reversioner sold him all the trees *that could be spared*, wherefore he cut them, &c. And demurrer,

1. Because the plea does not answer the selling.

2. Because no consideration is shewn for the sale of the trees.

3d. Because, not being excepted out of the lease, the reversioner had not the property in him, and could not sell them.

4th. Because admitting that he might sell them, the sale must be by writing.

5th. Because the bargain and sale is void for uncertainty, no arbitrator, &c. being appointed to declare what could be spared.

29. E. 3. 26. Dier, 206. 208. Hob. 174.

4. Co. 62. 5. Co. 11. 11. Co. 48. 2. H. 5. 7.

3. E. 2. Wals. 4. Plo. 6. Dier, 65. a.

2. H. 7. 14. 2. Rob. Ab. 816.

Hob. 174, 175.

* [90. b.]

(6) Waste lies against one executor alone without naming his companion, if the waste was done by him alone. 3. E. 3. Fitz. Wast. 3. [2. Inst. 302.]

ensuing,

ensuing, the said *I. C.* made his will, and made the said *M.* the defendant his executrix, and died; and she entered as executrix, and by virtue of the said bargain and sale, &c. of the said trees in form aforesaid made, *she cut down and carried away* the oaks and ashes aforesaid, growing *sparsum* upon a close of the said lands, as she lawfully might, which *cutting down and carrying away* of the said trees are the same waste whereof, &c. And they averred that the said oaks and ashes were growing upon the said lands on the said 20th day of *March*, in the said first year, *and then might reasonably be spared*, and this, &c. when in fact it was alleged before that the bargain and sale was on the first day of *March*, &c. And to this plea the plaintiffs demurred in law.

(8) And it seems the plea is insufficient, because the *selling* is not answered but with a *carrying away*, which is no *selling*.—And for this see *Long Quinto Ed.* 4. 100. b. but note that case well, as it differs much from this. Also the matter of the plea in discharge of the waste is insufficient for divers causes. In the first place, the bargain and sale is alleged, and no sum certain is mentioned, nor yet “*for a certain sum of money*” generally; so there wants a *quid pro quo*, which is necessary in every contract. Also they sell all those *their* woods and trees, and they have none there, and then they sell the thing that is not their own, for the special property is in the lessee, which is *Cowper*. And to prove this, the woods and trees are parcel of a lease, and pass to the lessee as well as the land, if they are not excepted by it: and in proof of this all fruits and profits arising from the fruit-trees shall be the lessees, and the shadow, and also the branches, and loppings for fuel or inclosure of fences.

(9) And although it would be a good bar in waste for the lessee to say, that his lessor who is the plaintiff did the waste, yet if the lessor cut down the trees without the license, or against the will of the lessee, an action of trespass well lies against him by the lessee; and therefore an heir in knight service being in ward felled the trees on the lands, and the guardian brought trespass against him, and he pleaded the special matter in bar, *et non allocatur per Cur.* 5. H. 4.

(8) 8. Jac. adjudged, that it is sufficient without alleging for a certain sum of money in a bargain and sale; and with this agrees 4. H. 6. 1.; and 4. *Dodbolt's* case, 40. *Eliz.* where a bargain and sale is found by verdict, the consideration may be intended (a).

(a) No case is to be found with the name of *Dodbolt*; but *Bassett v. Maynard*, Cro. | *Eliz.* 819. has nearly the same words.

fol. 59. [2. b. pl. 7.] where the writ was "*his trees*," &c. And if the trees become rotten, or are thrown down by tempest, shall not the lessee have them? It should seem so: for in 40. Ass. [pl. 22.] it is agreed that the lessor shall not have waste or trespass for them against the lessee if he take them: and in 44. E. 3. [44. b.] in waste, it is ruled, that if the lessee cut down trees to repair the house, and afterwards the lessor take them, that matter is no bar in waste, because the lessee may maintain an action of trespass against his lessor for them, which proves the property of the trees to be in him, and not in the lessor. (10) And admit that the mere property or general property of the trees be in the lessor, or him in reversion, yet that * property cannot vest in or change to the lessee by naked words without writing, any more than in the case in 6. H. 7. [7. b. 9. a.] where one took the goods of another without title, and he made a gift of them to the trespasser; and this was holden not good without deed, because he had the possession and the property, although not in right, for the right in a chattel cannot be extinguished, or given without deed, any more than the right in lands: and therefore if the bailor of chattels give them to the bailee by parol, it is not good for the cause aforesaid, because he cannot deliver them to the bailee; wherefore, &c. So also the case in 2. H. 7. [14. b.] in waste supposed in digging gravel, defendant pleads the command of the plaintiff to do it, without deed, and it seems it is no plea by the better opinion, for the lessor had nothing to do with the gravel, &c. So all this matter tends to prove that the bargain and sale which calls that their own which they have not, is void, &c. But admit their power and ability to make the sale, then we must see what thing and what number of trees are sold, for the words are, "*all those their woods and trees which then might reasonably be spared*." What manner of certainty is in these words, and who shall be the judge of the *sparing*, the vendor or the

46. b. Dier, 37. a.
2. E. 4. 2. 7. H. 4.
2. b. 47. E. 3. 5.
Dier, 19. b. 36. a.
Moor. 7. 9. 10. H. 7.
2. b. 7. H. 6. 38. a.
4. Co. 63. b.

12. E. 3. 48. a.

[1. Term Rep. 55.]

11. Co. 48. b. 82. Co.
Car. 243.

21. H. 7. 39. Dier,
117. 10. H. 7. 27. b.
2. E. 4. 16. a.

[See 1. Wood Com.
726.]

* [91. a.]

10. H. 7. 8. 41. E. 3.
Wast. 82. 27. H. 6.
46.

2. Rol. Ab. 55.

Finch. 13. Davis, 36.
a. Roll's Contin. 356.
Moor. 881.

(10) *M. 3. Jac. B. R. & Fieldhouse's case* against *Wood* in an action upon the case, where the defendant boarded and had pasture for a gelding with plaintiff, and undertook to pay him what should satisfy him for the time past, and to come; and adjudged good, notwithstanding the uncertainty. 2dly, He may have several actions, one for the time past, the other for the time to come. 3dly, The jury shall assess in this case what he shall have. And it was resolved in the same case, that if I promise as much as he shall ask, it is a good *assumpsit*. See & Lit. pl. 212. If I † *am* seised of a manor, and grant part of it, the moiety shall pass. By LORD COKE, 7. Jac. C. B.

† Orig. *ly*.

vendee?

[1. Wood Conv. 730.
731. Shep. Touch.
249. Bac. Ab. Grants,
H. 2.]
2. H. 7. 3. a. 13. a.
2. Co. 37. a. Perk.
17. a. 21. H. 7. 18.
b. Plow. 13. a. 8.
Co. 147. Pl. 131.

vendee? And it seems neither of them: yet by common intendment the vendor has more knowledge of the necessity of trees being preserved, and which may be spared as superfluous, to the maintenance of the inheritance. (11) And it is like a gift made by me of all those my horses *which may be best spared*, this is void for want of a certain pointing out or assignment; but if I give you one of my horses, although that be uncertain, yet by your election that may be made a good gift: and if I bargain with you that I will give you for your land as much as it is reasonably worth, this is void for default of certainty; but if the judging of this be referred to a third person, and he adjudge it, then it is good. So here if the judging of the *sparing* had been appointed to certain persons, and they had given judgment upon it, it is good enough; but because the judgment is not referred to any certain reasonable person, but only left in doubt, it is not reasonable that either of the parties should judge of it, for what one perhaps would judge proper to be spared the other would not; wherefore, &c.

Turney against Sturges.

Acceptance of rent in satisfaction of dower after judgment to recover, is no bar to a *sci. fa.* to have execution, unless the rent were assigned out of the land demanded.

4. Co. 1. b. Moor's
Rep. 43. Co. Litt. 34.
b. 36. b. 169. Hutt.
113.

* [91. b.]

33. H. 6. 2. b. 21.
E. 4. 3. a. 26. Aff.

(12) **SCIRE FACIAS** brought by *Alice Turney* against *John Sturges* to have execution of the third part of a manor recovered by a writ of dower; who pleads in bar, that after the judgment, and before the suing out of the *scire facias*, the plaintiff, by her acquittance sealed, acknowledged the receipt from the defendant of thirty shillings due for his rent for one quarter of a year at the Feast of *Christmas*, parcel of six pounds annual rent awarded to the said *Alice* by *R. B.* and *J. R.* arbitrators elected as well for the plaintiff as for the defendant, in full recompence of her entire dower which she was entitled to have of all the lands which were of *J. Turney* * her late husband during their marriage, &c. And this was holden no plea (a), because

(12) 6. *Eliz.* that in dower acceptance of quarters of corn during life is a good bar, as of acceptance of rent; otherwise of an horse, and such things as do not arise from the land. Moor's Rep. fol. 48. [59. pl. 167.]

(a) But though a collateral satisfaction is not pleadable at law in bar, still in equity it is a good bar of dower. 2. Vern. 365. And see 1. Eq. Caf. Ab. Dower, B. 9. Mod. 152. 1. Br. Caf. Ch. 292. 2. Bac. Ab. 142, 143.

this is not rent issuing out of the land whereof she has recovered her dower, for which she may distrain of common right: wherefore he amended his plea, and pleaded the rent by grant without deed, to be issuing out of the land whereof she has recovered dower, in recompence of all dower, where-to she agreed. (13) And the Judges were now divided, whether this was a good plea: *ideo quare*; for PERKINS, fol. 79. [176. pl. 410.] thought it a good plea in dower. See *scire facias* for dower recovered E. 31. E. [3. Fitz. Sci. Fa. 99.] where the case was, That the husband was seised of two manors whereof the wife was dowable, and enfeofed a stranger of both, and of one of them he took back an estate to himself and his wife in tail, by fine *sur render* only; and the husband died, and the wife survived, and counted in possession of the tail; and she brought dower against the feoffee of the other manor, and recovered the third part thereof, and then brought a *scire facias* to have execution; and the † *defendant* pleaded an assignment and acceptance by parol of the manor in tail in recompence of the dower recovered, *et non allocatur*; but she had execution, &c. Note, that the common opinion amongst all the Judges at this day is, that if husband and wife made a lease for term of years before the statute 32. H. 8. [c. 28.] by parol reserving rent to them, and afterwards the wife accept the rent of the termor, when she is sole, this will not estop her from avoiding the lease, if it was not by indenture, because her assent is necessary to the commencement of the lease, and this ought to have been by deed.

† Orig. p^r.

But the feoffees need not plead this to be by deed: and this was by inspection of a judgment between † *Barbam* and *Allen*, 36. Eliz.

41. 20. El. 361. b.
1. Inst. 169. 17. Aff.
3. 6. E. 2. Dower,
146.

26. Aff. 41. F. Dow-
er, 78. B. N. C. 61.
7. H. 6. 33, 34. 1.
Inst. 36. b.

1. H. 7. 16. a. 9. Co.
79. b.

14. H. 7. Rot. 303.
Palm. 34.

2. Co. 61. a. 5. 21. b.
Plo. 431. a. 4. Mar.
146. b. 11. 21. H. 7.
13. b. 38. a. 26. H. 8.
2. a. 15. E. 4. 17. a.
7. E. 4. 7. b. 9. H. 6.
44. " 7. E. 3. 13.
3. H. 6. 53. 3. Co.
31. 15. E. 4. S. 21.
H. 6. 24. 1. Lecn.
192. 204.

[Cowp. 201. 483. Dougl.
50. Co. Lit. 215. a. 1.
Term Rep. 86.]

Lyttleton against Hucclleton.

(14) THE array was challenged in attain between *Lyttleton* and *Hucclleton*, because *Richard Manering*, knight, sheriff of the county of *Salop*, took to wife *Elizabeth*

Challenge to the array because the wife of the sheriff having issue by him still alive was re-

(14) *Mich. 19. Jac. B. R.* [Anon. Bend. 15. 2. Rol. Rep. 181.] between *Banister* and *Ayre*, in error upon a challenge to the array, where it was not alleged that such a one was the wife of the sheriff at the making of the panel; it was agreed PER CURI, that an exception for that cause was not good; for if the sheriff took her to wife after the making of the panel, then it can not be favour: and this was also agreed by the court of C. B. where the first judgment was given, and this Book affirmed to be good law, by both courts.

lated to one of the jury, is bad, without averment that she was his wife before the arraying of the panel, and that he was sheriff at the time of the panel; but the place where the issue is alive need not be alleged.

Dier, 78. a. Co. Litt. 157. a. 2. Rol. Ab. 637. 642. 9. 10. 11. 15. H. 7. 22. 7. 2. 9. 6. E. 4. 5.

[1. Leon. 88. 21. Vin. Ab. 236. 3. Bac. Ab. 252.]

Dier, 38. a. Liver de Entries, 114. 22. E. 4. a.

daughter of *Robert Corbet*, knight, son of *Richard Corbet*, knight, son of *Robert Corbet*, knight, father of *Ann*, mother of *Thomas Stury*, father of *Thomas Stury*, one of the jurors of the petit jury: and farther he says, that the said sheriff has issue a son, s. *Arthur Manering*, knight, by the said *Elizabeth*, which *Arthur* is still in full life; and this, &c.; and for this reason he prays the panel may be quashed. And to this challenge made in this manner by the party, the defendant demurs, &c. And the exceptions were, that it was not alleged that *R. M.* was sheriff at the time of serving the writ: also, that it was not averred that he took the said *Elizabeth* to wife before the making of the panel: also, the place where *Arthur* is alive is not alleged: wherefore, &c. But the last exception is of no consequence, for there needs no *venue* to try that issue; wherefore, &c.

* [92. a.]

Albeney's Case.

Where, in a lease by indenture, it was agreed that "any one to whom interest in the premises should come, not being wife or child of the lessee, should find such surety, &c. on pain of forfeiture;" the widow of the lessee's son having found such surety, her second husband assigned to a stranger; Whether he is bound to find fresh surety on pain of forfeiture?

[Shep. Touch. 120. Co. Lit. 203. b. Mr. Butler's note (1).]

27. H. 8. 6. a. 32. H. 6. 10. 31. H. 8. 45. a. 5. Mar. 152. a. 4. Co. 120. a.

(15) *ELIZABETH*, late abbess of *Denny* in the county of *Kent*, with the assent of her convent, by their indenture demised the rectory of *B.* to one *Sir John Dyves* for a term of eighty years, and in the indenture was a clause as follows, s. "It is agreed between the said parties, if any person fortune hereafter to have any right, title, or interest, in the said parsonage, not being the wife or child of the said *Sir John* *, then he or they which shall fortune to have any such right, title, or interest, shall, within one year next after, find sufficient security to be bound to the said abbess of *D.* for the time being, in forty pounds by obligation, for the payment of the said rent, or else the said lease from thenceforth to cease, &c." And afterwards *Sir J.* devised his term by his will to his wife dame *Elizabeth*, and died; and afterwards she devised it to *John* her son, and he gave it to *Audrey* his wife by will, and died; and she put in sufficient surety to *William Butler*, who had purchased the fee-simple of the parsonage of the king; and then the second husband of the said *Audrey* grants all his estate to one *Albeney*: Whether he shall be bound to find security upon pain of forfeiture of his term? *quare*.

(16) **W**ASTE was assigned in woods, s. in cutting down and selling ten oaks, &c. and the truth was, that the defendant had only lopped and shred the oaks. Can he safely plead *nil wast fait*, and give this special matter in evidence? And it seems he well may, as the waste is assigned. *Simile*, H. 5. p fol.

Waste assigned in cutting down and selling, where defendant had only lopped, upon *nil wast fait* pleaded he may give the special matter in evidence.

12. H. 8. 1. Dier, 90. b.
361. 1. Inst. 283. a.
29. H. 8. 36. a.
[Bul. Ni. Pr. 119, 120.
4. Bac. Ab. 64, 65.]

(17) **I**N the exchequer chamber it was asked for the queen, of all the Judges and Barons there present, that whereas the late king had granted by his letters patent to an alien merchant, that at any time during his life he might export all sorts of the merchandizes of the kingdom out of it, or import from foreign parts all merchandizes, &c. paying to him, and his heirs and successors, for the customs, subsidies, and all other duties whatsoever on the said merchandizes, as many and as large sums of money as any *English* merchant or denizen paid, and not more or otherwise, so that the said customs and subsidies should not exceed the sum of fifty pounds *per annum*, &c. And by the king's death, the subsidy granted to him in the first year of his reign by parliament, of tonnage and poundage during his life only, was determined. And the question was, Whether the whole patent was void on this account? And it seemed to all, not; but that it remained good for the customs, wherein the king had an inheritance, as a prerogative annexed to his crown: but then *quære*, Whether it be not void by the death of the king? because the crown was only entailed upon him by 35. H. 8. [c. 1.] (18) Also, if the king grant licence to export one thousand tons of beer, any statute or restriction to the contrary notwithstanding (*a*), and do not grant for himself and his heirs, or successors, Whether the grant be not determined by the death of the king, because it is only a licence dispensative, and revocable before the execution of it?

A grant by the king to an alien that he shall pay only *English* customs, binds the king's heirs and successors, though they be not named in the grant.

But *quære* of a licence to export beer *non obstante* &c. unless heirs and successors be expressly named.

[Jenk. Cent. 5. c. 41. S. C.]

Dier, 43. b. 165. 270. Vaugh. 161.

[Hard. 443, 444. 4. Bac. Ab. 205. Bac. Ab. Prerogative, D. 7. Cowp. 108. Yelv. 15.]

Davis, 9, 10. b. Co. Magn. Chart. 58. Co. Litt. 5. 66. fol. 52. b. N. B. 223. Moore, 675.
1. 2. Co. 48. 49. 1. Rol. Ab. 73. Plo, 455. b. 457. b.

(19) Also the king made a grant of an annuity for term of life, "to be received at the receipt of our exchequer," and

Grant by the king of an annuity for life to be received at the receipt of

(a) By 1. W. and M. Sess. 2. c. 2. §. 12. it is enacted, that from and after that session of parliament no dispensation by *non obstante* of or to any statute or any part thereof shall

be allowed, but that the same shall be holden void and of no effect, except a dispensation shall be allowed of in such statute, &c.

our *exchequer* is good during the life of the king, but does not bind his successors without express words.

did not say in his grant “for him, his heirs*, and successors;” Whether the heir or successor shall be charged with this? And the *habend* was, “to be received at the receipt of our *“ exchequer per manus thesaurar’ camerariorum nostrorum “ ibidem”* for the time being. And this grant was for service performed as well to king *Hen. 8.* as to the said king *Ed. 6.* And it was debated in *Serjeants’ Inn.* And by the opinion of *CORDEL, Solicitor General, GRIFFITH, Attorney General, DYER,* one of the Queen’s Serjeants, *WHIDDON, BROOK, Chief Baron, MORGAN and BROMLEY, Chief Justices* of both benches, the annuity is determined by the death of the king; but by the opinions of *STAMFORD, SAUNDERS, BROWN, and PORTMAN,* it is not: *ideo quære.* And it was strongly holden that the grant is void to charge the person of the king; and without shewing in certain by what hand it shall be paid, the grant is void; and this by the opinion of *Fitzherbert* in *Nat. Brev.* [fol. 152. L.] *the last case under the Writ of Annuity.* (20) And then for this reason there is no need of saying “for the heirs and successors” of the king; but by reason of those last words, *s. of our exchequer per manus thesaur’, &c. nostrorum,* this refers only to king *Edw. 6.* and therefore the estate in the annuity was limited, and by the death of the king ceases. And see therefore 2. *H. 7.* [6.] in *Grant.* And from the relation of the bishop of *Ely* in returning from *Westminster Hall,* there is a recital in the patent of the *Stilyards* made to them by *Edw. 3.* s, “and because in the letters patent of our progenitor these words are not contained, *s. for us, our heirs, and successors,* therefore we are not bound &c. yet “being willing to do a greater kindness to them we give and “grant, &c.” So the opinion above was not new, &c. But see *Plowden’s Com.* 459. at the end of *Wroth’s case,* by *SAUNDERS, Chief Baron,* that the resolution of the

12. H. 4. 3. Plo. 192.

[Salk. 58. Fit. Nat. Brev. 358.]

23. E. 4. 5. b.

1. R. 3. 4. a. 33. H. 8. E. N. C. 203. 6. E. 6. Dier, 73.

{20} 18. E. 2. Rot. 30. in quo warranto, 14. E. 2. at the tower of London, it appeared that the German merchants had a house which is commonly called *Gildbalda Teutonicorum;* and this is now the *Stilyard* (a). MR. NOY.

(a) The *Stilyard Company* was a body of merchants created in the year 1215, under Henry III. in favour of the free cities of Germany, which had been assistant to him in his wars against France. It took its name from the place where they lived, which was a yard near *London Bridge,* where steel was sold, and (as *CHAMBERS* says) in some re-

cords was called *Gildbalda Teutonicorum.* It had the privileges of selling and exporting all *Engl’s* manufactures, but these being found prejudicial were revoked by Edward VI. yet it afterwards redeemed its rights, and lasted till the year 1578, when they were finally abrogated by queen Elizabeth.

Judges above was, that if the annuity were granted for the execution of any office or service, the patents need not have the word "*heirs.*"

Moyle *versus* West et al'.

(21) ONE *Lewis West* and his wife formerly brought a writ of partition against *Sir Thomas Moyle*, Knight, and *Thomas Culpeper*, to have partition of divers manors, lands, and tenements in *Kent*. And by the declaration it appeared, that the plaintiffs claimed one third part of the land to be divided into three parts, and that *Thomas Culpeper* ought to have another third part, and *Sir T. M.* the remaining third part. And the defendants appeared and confessed the action, and thereupon judgment was given that partition should be made; and a writ awarded to the sheriff to make partition by the oath of twelve good and lawful men; before the service of which writ, because the return of the partition was faulty, another writ *de aliâ partitione faciendâ* was awarded; and before the execution of this, *Sir T. M.* brought a new writ *de part' fac.* against *West* and his wife, and *T. Culpeper*, of one of the said manors; and they pleaded all this matter in bar. (22) * *Quare bene*, Whether it be a plea, or shall be pleaded by way of estoppel to say that they oppose the partition, when it appears by the first record that they were always ready since they confessed the action? or, Whether they should plead the aforesaid matter, and conclude, if pending the aforesaid writ of partition not yet duly executed, the plaintiff ought to be answered to his said writ (a)? *Vide* *E. 22. E. 3.* where a *quare impedit* was brought against *B.* by *A.*; and *B.* brought another against *A.*; both of the same church, and returnable on the same day; and the Court would not suffer both writs to stand, but obliged one to be discontinued,

In a writ of partition, it is a good plea that the defendant has already the same writ against the plaintiff, and judgment of partition yet unexecuted upon it.

Dier, 73. a.

[4. Com. Dig. 312, 313.]

* [93. a.]

11. H. 6. 27. b. N. B.
38. F. 19. H. 6. 67.
20. E. 3. *Quare Imp.*
64.

(a) Since 8. & 9. W. 3. c. 31. §. 3. There can be no plea in abatement to this writ.

Duke of Norfolk's Case.

Whether if a *certiorari* be directed to two clerks of the parliament to certify the tenor of an act, one alone may certify? *qu.*

[Dal. 19. pl. 4. S. C.]
33. H. 6. 18.

23. H. 8. c. 18.
3. Bulst 210.

[4. Vin. Ab. 355.]
5. Co. 94. Dier, 262.

(23) M E M. That in the last parliament of king *Hen. 8.* a bill of petition was exhibited to the king by the lords and commons, for the attainder of the duke of *Norfolk* of high treason, which passed through the two houses with the consent of the lords first, and indorsed, "*Soit baile aux com-mons;*" and then, with the assent of the commons, indorsed, "*Les commoners sont assentus.*" And when it was passed, the king, by his letters patent, bearing date 27. *Jan.* in the 38th year of his reign, reciting the said bill made in the form of an act, and concluded and assented unto by the lords and commons, thought proper to grant and give his royal assent and consent to the said bill, and every thing therein specified, by these words: "*Know ye therefore, &c.* that he " had given power and authority to four of the lords, or three, " to give assent and consent in his name, ratifying what they " should do therein." And the letters patent bore the sign manual of the king, s. HENRY REX; and had also the great seal to them. And this commission was annexed to the said bill, and the bill was also indorsed with these words, "*Soit fait come est désiré.*" (24) And it was much debated among the Judges, whether this was a complete act or not. And they who had purchased the lands which were the duke's of the king, procured a *certiorari* directed to two of the clerks of the parliament, to certify the tenor of an act of parliament made in such a year concerning the attainder of the said duke. And one of the clerks only made a certificate of the naked bill, without the circumstances, &c. And it was questioned whether this was good, because there was no warrant for one of them only to certify. And because the purchasers had procured a *certiorari*, and the tenor of the act, without men-

(24) Upon a diminution alleged, a *certiorari* issued to A. and B. Justices of the great sessions of *Anglesey*, which was returned by one of them under his own name, and good.
3. *Jac. B. R.*

3. *Jac.* † Commission directed to four or two, and two of them took; the other two could not certify there [ante 62.].

It was affirmed in the commons-house of parliament, in the first year of *Queen Mary*, by *William* then *Lord Paget*, who came then into the same commons-house to testify his knowledge touching *King Henry 8th's* assent by letters patent to the pretended act of the surmised attainder of the said duke, who upon his honour deposed that the same was not subscribed with the hand of the king, but the stamp only put thereto, which was done by one *William Clerk*.

† I could not find this case; the original is, "*Commission direct ad 4 ou 2 & deux prist*" | "*l'autre 2 & ne point certifie la.*"

tioning the commission to have been exemplified in chancery, the duke procured the very original record of the act to be brought by SPILMAN, the clerk of the parliament, before the Justices at *Serjeants'-Inn*. And note, that by great probability and strong presumption, the king had not put his sign manual. First, inasmuch as it was written beneath the *teste* of the patent, whereas he was used to put it above the head. Secondly, The writing was so perfect, that it could never have been written by a man so ill and near his death as the king was, for he died the same night, &c. And some farther said, that it was a stamp. And see for * this assent the statute 33. H. 8. c. 21. And afterwards, the said act of attainder was declared by the parliament to be null and void. *Quære* the act itself. [37. H. 8. c. 8.]

Plow. 5. 63.

* [93. b.]

7. Co. 13.

Raft. Parliament, 18.
Dier, 138. b.

Terrel against Terrel, Widow.

(25) **I**N waste brought by *John T.* against the said *Anne*, the defendant made default upon the summons, attachment, and *disfringas* served; whereupon a writ of waste was awarded to the sheriff, and the waste found by him by a verdict, and returned; and judgment given that the plaintiff should recover his seisin in the places wasted, and treble damages: and the defendant brought a writ of error, and assigned error, in that at the summons the record was, that *the plaintiff offered herself on the 4th day by her attorney*, and did not shew his name, but after the assignment of waste the attorney's name was expressed. (26) Also in that the original writ recites that *Guy Crayford* and *T. Marbury* were seised of the land, &c. to the use of *I. T.* father of the said *I. T.* plaintiff in the action, and *Anne* his wife, and of the heirs of *I.* the father, without shewing in the writ of what estate the feoffees were seised. But afterwards in the assignment it was shewn in certain "*in their demesne as of fee.*" (27) And also because it was not alleged how the use of the

The omission of the plaintiff's attorney's name in the record, where he offered himself on the 4th day by attorney, is error, though mentioned afterwards in the declaration.

In waste, the omission in the writ of what estate feoffees to the use of the plaintiff were seised, though expressed in the assignment of waste, is error.

Not shewing the commencement of a particular estate alleged is error.

And plaintiff shewing a tenancy for life with the reversion to himself, without the words "*appearing or belonging,*" is error also.

[Dal. 5. pl. 7. S. C.]

[Doug. 114, 115.]

(26) This was not error, as was adjudged in *Preston and Tole's Case*, C. B. and affirmed in B. R. [Cro. Eliz. 74, 75.] for what is in the beginning of the record is only recital, where it is said *by his attorney*, and when he comes to the declaration, then he ought to name the attorney; and it is common in the premises, which is only preamble, to allege a thing generally, and in the declaration to allege it specially.

37. *Eliz. Afcue and Hollingsworth's Case*, [Cro. Eliz. 544.] holden to be no error, for such is the practice of the Common Bench.

1. Rol. Ab. 289. (H) 2.
1. Leon. 175. 3. Bullt.
201. Dier, 186. a. 3.
Cro. 722.

11. H. 2. 4.
20. E. 4. 10.

[Hedl. 79. 5. Com.
Dig. 370.]

particular estate commenced, either in the original, or in the assignment of waste. Also in the assignment of waste he alleges the statute 27. H. 8. [c. 10.] for the execution of the estate, and shews the death of his father, and the surviving of the said *Anne*, and the descent of the reversion to him as son and heir, whereby the said *Anne* held for the term of her life *the reversion to him and his heirs*, and did not say *appertaining or belonging, &c.* And afterwards in the same Term the judgment was reversed for the said errors.

Woodhouse's Case.

Lease for years to *A.* and afterwards a lease of the same land to *B.* (misreciting the date of the first lease) to commence from the time of the first interest being lawfully defeated; the assignee of *A.* took a new lease surrendering the first: *Quære*, Whether *B.*'s term shall take effect?

4. Co. 74. B. N. C. 395
Br. Leases, 62. Plo. 192.

2. Mar. 116. pl. 70.
6. Co. 36. a.

[3. Bac. Ab. 428.]

Dier, 177. b. Plo. 198.
b. Perk. 118.

14. H. 8. 15. a. B. N. C. 392. b. Perk. 118.
Plo. 199. Dier, 112.

[Co. Lit. 46. b. Mr. Hargrave's note (10.) and the Books there cited.]

(28) **T**HE last bishop of *N.* with the assent of his chapter, made a lease by indenture bearing date 10. Dec. in the 25th year of *Hen. 8.* to one *I. Funke*, for the term of thirty years then next ensuing. And afterwards, the said bishop reciting the said lease to bear date the 9th day of *December*, and that the term ought to commence at the Feast of *Saint Michael* the Archangel then last past (which was false), leased the same land to one *Sir T. Woodhouse*, for a term of certain years yet to come, with the assent of the said chapter, *the term to commence immediately after and from the time, or as soon as the interest and possession of the said I. F. or his assigns shall happen to be lawfully defeated and avoided, &c.* and this second lease bore date in the 30th year of *Hen. 8.* And afterwards, by indenture bearing date the 13th of *Januery*, 35th *H. 8.* the said bishop, *ut supra*, made a lease to one *Christopher Speyne*, assignee of the said *I. F.* of the term aforesaid, for the term of fifty years thence next ensuing, which was a surrender in law of the first lease: now, Whether the mesne lease of *Woodhouse* should take effect or not? was the question. And, in fact, the first lease was surrendered and cancelled.

(28) *Mich. 5. Jac.* it was resolved, that if a lease be made to commence at a feast or time impossible, there it shall commence immediately, as a bond to be paid at *Doom's-day* shall be paid immediately, 6. Co. 36. Flow. 192. [2. Salk. 463. 1. Mod. 180.]

Mis-recital of the date of the lease of a common person is not material, because there is a particular time appointed from which the lease is made.

Hil. 30. Eliz. Two, having a rent, assign it over to five, who grant it to one, who reciting by the deed, that "*Whereas five have granted a rent to two;*" (when the grant was the reverse) &c. [and adjudged good.] *Lewin v. Mouldie*, [Cro. Eliz. 127. 3. Leon. 135.]

* Lady Cromwell's Case.

(29) **KING** Edward 6. granted to his aunt *Lady Cromwell* the manor of *Liddington*, in the county of *Rutland*, to hold to her for the term of her life, "if it shall so long please us." And afterwards the king, reciting the grant, granted the reversion of it to *Sir W. Cecil* in fee, rendering after the death of the said *Lady Cromwell* twenty-seven pounds, &c. And, Whether *Cecil* can avoid this estate at will, or not? *quare*. And it seemed, not. And in the same patent there were other manors of similar estate, s. "if it shall so long please us," which remain in the hands of the queen who now is. It seems that this estate may be defeated by the queen.

The king having granted an estate for life, "if it shall so long please us," granted the reversion to another in fee: the reversioner cannot determine the estate at will, but the king's successor may.

14. H. 8. 13. 27. H. 8.
17. 5. E. 3. 4. Pre-
rogat. 20. 25. H. 6.
Suggestion, 9. 21. E.
3. 41. 15. E. 4. 32.
[Mo. 176.]

Chafyn against Lord Sturton.

(30) **KING** Edward 3. being seised of the county of *Cornwall*, and of divers possessions thereto appertaining in *Cornwall*; and being also seised of the manor of *Meere*, in the county of *Wilts*, in fee, in right of his crown, it was enacted in the parliament holden in the 11th year of his reign, that he should make *Edward* his eldest son, then earl of *Chester*, duke of *Cornwall*; and that the eldest sons of the kings of *England*, to wit, those that should be next heirs to the crown, should be dukes of *Cornwall*; and that the said county should be given to the said *Edward* the son, as in name of a duchy; and that this county of *Cornwall* should always remain as a duchy to the eldest sons of the kings of *England* who should be next heirs of the realm, without being otherwise disposed of. And afterwards, the said king made and created his said son duke of *Cornwall*, and by his letters patent granted to the said duke the said manor of *M.* among other things, "to have to him and his eldest son, and the eldest sons of his heirs, kings of *England*, dukes of the said place, who should hereditarily succeed to the kingdom of *England*, to hold of the said king and his heirs." And by the same letters patent he annexed and united the said manor to the said duchy, to remain for ever, without being severed or granted to any other, or in any manner; so that on the death

Grant of a manor by Ed. 3. to his son prince *Edward* and his heirs, eldest sons of the kings of *England*, to go inseparably with the duchy of *C.*; the prince died, and the manor escheated to the king, and descended to *Henry 8.* who made a lease of it after the birth of *Edward 6.*; but he sued out livery neither of the duchy nor manor in the life-time of his father: this lease is good, and *King Edward 6.* could not avoid it.

T. 7. E. 6. Rot. 303.
in banco, on a demurrer in replevin. 8. Co. 23.
b. C. B. Prince's Case,
Co. Lit. 27. a. 1. Co.
43. b. 137. b.

death of the said duke, or of others dukes of the said place, and their son or sons to whom the said dukedom by force of the aforesaid grant of the said king should belong not then appearing, the said dukedom and manor should revert to the lord the king and his heirs, kings of *England*, to be retained in their hands, until any of such son or sons, hereditarily to succeed to the said kingdom of *England*, should appear, to whom then successively the said duchy, with the appurtenances, the said king for himself and his heirs granted and willed to remain, to hold as above expressed. (31) And afterwards the said duke died in the life-time of his father, wherefore his father re-entered upon the said duchy and manor, and died seised. And this dukedom and manor afterwards by succession descended to the late king *Henry 8.* who made a lease of the manor of *M.* in the 28th year of his reign, which was before the birth of king *Edw. 6.* And after the birth of the late king *Edw. 6.* who was then prince, s. in the 35th year of *H. 8.* the said king *H. 8.* made a lease of the said manor for a term of years, no * livery being sued of the said dukedom or manor by the prince in the life of his father: Whether this lease was defeasible or not? was the question. (32) And note, that by the pleading it is not alleged in certain that the said *Edward*, first duke of *Cornwall*, died without issue, but in truth he had issue *Richard 2.* king; but he was not duke, or entitled to the dukedom by the limitation aforesaid, as it seems, because he was not the first-born son of the king, &c. And it seems the said lease is good, and could not be avoided by the late king *Edw. 6.* for four reasons.

* [94. b.]

8. Co. 30.

18. H. 8. Br. Patent,
104. 1. Co. 43.

First, It seems that by the said *habendum* and limitation the said duke had only an estate at will in the said manor, being parcel of the possessions of the crown, and not of the aforesaid county of *C.* of which only the said statute speaks.

The king cannot unite
a manor to the duchy of
Cornwall without par-
liament.

Davis, 43. a. 8. Co.
21. 27.

1. Leon. 26.

8. Co. 25. 4. H. 6. 29.

6. H. 4. 1. 16. E. 3.

Age, 46. 48. E. 3. 8.

11. b.

(33) Also, the king cannot annex and unite the said manor to the said duchy by letters patent without the authority of parliament, and make it parcel of the duchy, and to follow the form and course of the duchy as above.

Also, supposing these matters to be good, still by the death of the duke of *Cornwall* without issue, the manor came to the king as an escheat for want of a duke and first-born son; and was then knit and rejoined to the crown in lieu of the feigniory,

feigniory, which was a tenure *in capite*, and now in its pristine state; and by the birth of any other son afterwards, it cannot be dissevered and disunited, and made parcel of the duchy again: but admit that it could be dissevered again, yet without livery or *ouster le main* sued of the king no possession is divested from the king; wherefore, &c.

(34) Also note, that the prince, in the life-time of his father, when he was duke of C. did not enter into the land, or make the new lease of it to *Chafyn*, but the lease was made in the third year of *Edw. 6.* at which time he was not duke of C. for that name was merged in the crown at that time.

Plow. 214. Diet. 137.
209.

Also note, That it is supposed in the pleadings that immediately after the birth of the prince he was seised of the reversion in fee, which is impossible as long as the particular tenant continued his possession and term, as the case is in *Littleton*, of a lease of parcel of the demesnes of a manor with rent reserved, and afterwards he is disseised of the manor, and the disseisor dies seised of the whole manor, but the term continues, during that time the disseisee may distrain for the rent, and the reversion is severed from the manor in possession, although not in right. And also if the prince has title immediately to the reversion, then he has title to the possession, for he shall defeat all incumbrances, as the son who is born after a descent cast upon his sister, or after an escheat to the lord, &c. And the Judges would not argue that case, as I believe, because of the pregnancy of *Queen Mary*, &c. but at length, by their arbitrament the matter was finished, and *Lord Sturton* had the land, paying to *Chafyn* for it and for divers other injuries three hundred pounds.

Litt. 134. a. 2. EL.
178. b. Post. 302. b.

9. H. 6. 25. a. 9. 19.
H. 6. 52. 61. a. 5. E.
4. 61. B. N. C. 560.

[* 95. a.]

* (35) A MAN seised in fee of land holden of the king *in capite* died seised, having a daughter within age, and office was found, and the king granted the wardship of the body and land to *A. B.* who married the daughter, and had issue by her. Afterwards she accomplished the age of sixteen years, and the king being satisfied for the profits of the two years, they tendered a general livery, and before it

The king's ward being married and having issue, after she attained her age tendered her livery, but died before: it fully passed, her husband shall be tenant by the courtesy.

Co. Litt. 29. a.
Dr. & Stu. 84.

1. H. 7. 18. b. 6. El.
229. a. 2. 4. H. 7. 18. 1.

was fully passed she died without issue and under age :
Whether her husband shall be tenant by the courtesy ? It
seems that he shall. 8. Co. 172.

Whitton qui tam against Marine.

Mis-recital of the date
of an act of parliament
in the writ, where it is
rightly set out in the
declaration, will not ar-
rest the judgment.

Declaration on 5. & 6.
E. 6. c. 20. for *lending*
money for interest and usury,
and that the defendant
received usurious interest ;
plea, That he did not
receive, is a negative
pregnant; for by the
loan the offence is com-
plete.

Raft. Usury, 7.
Dier, 159. 34. b.
9. Co. 137.

Co. Litt. 36. a.

Hob. 246.

Noy, 6. 50.

Dier, 74. b. Plow. 84.

33. H. 6. 18.
B. N. C. 228.

7. Car. Cro. 232.

[2. Hawk. Pl. Cr. 350,
351. 1. Com. Dig. 231.
Cowp. 474. Fortesc.
372. Cro. Car. 424.]

18. El. 346. b. 347.

(36) DEBT brought by *Oliver Whitton*, who sued as well
for our lord the king as for himself, in *Easter*
Term last, *Rot. 524.* against *Maurice Marine*, upon the
statute of Usury made in the 5th year of *Ed. 6.* [c. 20.] (a),
for ninety-eight pounds six shillings and eight-pence ; and the
writ was, " to answer as well to our lord the king as to the
" party in a plea, that he render as well to our said lord the
" king as to the party, &c. which he owes to our said lord
" the king and the said plaintiff, and unjustly detains by rea-
" son of a certain attempt, *contrary to the form of the statute*
" *in the parliament of our lord the now king holden at West-*
" *minster in the sixth year of his reign* against those who, &c." and
counted the truth, s. that the parliament was holden on
the 23d day of *January* in the fifth year, and continued un-
til the 15th day of *April* in the sixth year, &c. and he de-
clared of the loan of eighty-five pounds for one month for
twenty marks of interest and usury to be rendered and paid for
the loan at the end of the month, and that the defendant had
and received the said usury and interest of twenty marks over
and above, &c. against the form of the statute, &c. (37)
And the defendant pleaded, *that he did not have or receive*
for the loan of the said sum of eighty-five pounds the said
twenty marks over and above the said sum of eighty-five
pounds, against the form of the statute, &c. And it was
found against the defendant. And now in this Term the
plaintiff prayed judgment, &c. And it was moved in arrest
of judgment that the statute was mis-recited; and this is
true, because the act has relation to the first day of that
session. Also the plea makes a jeofaile, because the statute
does not speak of any receipt of usury, but defends the loan
for usury to be had, or hoped for, although nothing be paid.
But it seems the plaintiff shall recover although the statute
of Jeofails had never been made. And first, it seems the

mis-recital of the statute in *the writ* of debt is of no consequence, because the putting in of the cause of the debt in the writ, *s. by reason of a certain attempt, &c.* is void and surplusage, and not used in any action of debt; but *the declaration* shall shew the cause of the debt; for the king and others may join in a writ of debt, and then declare upon a bond or other contract, &c. (38) Also it seems the statute is not mis-recited; for it is true that it was made in the parliament holden in the sixth year, for the parliament commenced in the first year, and continued till the sixth, and was one entire parliament; wherefore, &c. Also the cause of this action is grounded upon the statute, and the statute provides the punishment of usurers, *s. the lenders at usury*, and not the borrowers, and does not * punish the fact of usury, but the intention and effect only; for the words are, that "*no man shall lend set out give deliver or forbear to or for any usury increase lucre gain or interest to be had received or hoped for, upon the pain,*" &c. so that although nothing of the increase be rendered in fact and in effect, yet he is an usurer, and his eye was evil. And although the plaintiff has alleged here more than was necessary, yet is he not the worse for it: and since the defendant has traversed this surplusage, *s. the receipt of the interest, to wit, the twenty marks over and above the said loan of eighty-five pounds*, this is a negative pregnant, and implies a confession that the † defendant did lend and deliver the money for usury; and then the duty of the Court is to give judgment upon this confession of the defendant: as in 9. H. 6. [37. a. b.] in debt on bond, defendant pleaded that he ordered one to write the bond, and he sealed and delivered it to the scrivener to deliver to the plaintiff upon certain conditions, and that he delivered it before the conditions were performed, and so *non est factum*; although this issue was found against the plaintiff, yet he recovered *ex officio Cur. &c.* (39) And it is like other cases; as in *decies tantum* it is supposed that the defendant took money for giving his verdict, and also that he gave a verdict against the plaintiff, and [if] the giving of the verdict only be traversed, that is not material, for if he took money for that purpose it is sufficient. The law is the same in an undertaking to maintain, although he do not maintain in fact he is punishable. See 20. Aff. [fol. 176. pl. 15.] Also the

8. Co. 28. a. Plow. 79. a.

[4. Bur. 2418. 2. Black. 722. 3. Wils. 141. 61.]

27. Aff. 49. N. B. 23. 9.

3. Eliz. 203. a. 159. b. Mich. 4. Jac. Cro. 139. a.

* [95. b.]

19. E. 2. Darnley Pre-sentment, 21. Perk. 143. 144. 14. H. 2. 22. 8. H. 6. 16. 19. H. 8. 3. Dier, 34. 167. b. 16. Aff. 18.

N. B. 171. E. 7. E. 4. 15.

6. H. 1. 13. a. 21. H. 6. 20. a. 9. H. 7. 18. b. 27. Aff. 34. 19. R. 2. Champertie, 15. N. B. 172. C.

statute is, that if any one ship any wool or merchandize of staple to the intent to transport them over the sea to any other place than *Calais* where the staple is, the mayor of the staple shall have an action, &c.; although in fact they were not transported to the place intended, or although they be driven into the port of *Calais* by tempest, yet for the intention he shall be punished. Wherefore here for this intention and hope to have gain he was an offender against the statute, although he never took a farthing (a); and although all his sum and the whole loan and usury had perished, that is not material, &c. But no judgment was given, although it was long continued on the roll.

[Jenk. Cent. 2. c. 70.]

2. R. 3. 11. b. 1. H. 7.

3. 2. 37. H. 6. 12. b.

(a) It seems that this depended upon the wording of the act itself. The question when the usury is complete under the present statute 12. Ann. st. 2. c. 16. has been frequently canvassed in the courts. In the King's Bench, *R. v. Upton*, 2. Stra. 816. holden, that an indictment does not lie upon any usurious contract without there was

some loan or taking of interest under it. And in *Fisher q. t. v. Beasley*, Dougl. 235. solemnly determined, that the offence is not complete till more than legal interest is actually paid and received. But (*C. B. Lloyd q. t. v. Williams*, 3. Willf. 250. 2. Black. 729.) it then is, though the whole principal sum to be advanced is not yet paid.

Avowry for damage *feasant* under a lease from the fee. Plea, that the lessor was only tenant in tail, and a conveyance to the plaintiff as heir in tail. Replication, that the lessor reserved a rent upon the lease, which the plaintiff had accepted since the lessor's death, is a departure. Dier, 240. b. Co. Lit. 304. a. 5, 6. H. 7. 33. b. G. Plow. 105. b. [2. Willf. 98, 99. Bac. Ab. Pleas (L). 4. Term Rep. 504. 585.]

(40) THE avowant said, that long before the taking one *J. S.* was seised in fee, and leased to him for term of thirty years, and avowed for *damage feasant*. And the plaintiff pleaded in bar, that the said *J. S.* had only an estate tail, and shewed of whose gift, and conveyed the descent to him as heir in tail, and that he entered upon the lessee, &c. And the other pleaded, that the said *J. S.* reserved a rent upon the lease, which rent the plaintiff as son and heir had accepted since the death of his father, judgment, &c. and this was holden a departure. *Quare bene.*

* [96. a.] * Between Andrew Bainton, Petitioner, and the Queen. 1858

A covenant to "levy a fine" does not change the estate till the fine be levied; otherwise if the covenant had been "that A. shall have the fee, &c."

(40) SIR THOMAS SEYMOUR, late admiral, who was attainted, by indenture covenanted and granted to *Andrew Bainton*, in consideration that the said *Andrew* had conveyed divers manors, lands, and tenements, to the said *Sir T.* in fee-simple after the death of the said *Andrew*, that

be

he the said Sir T. would levy a fine to Warnford and Penney of other manors (by name) of which the admiral was then seised, by which fine the said other manors should be assured to the said Sir T. Seymour for the term of his life, remainder to the said Andrew in tail, and no fine was levied of it. And it was moved at Serjeants' Inn, Whether this covenant would change an use, or not? And BROMELEY, Chief Justice, PORTMAN, BROWN, SAUNDERS, BROOKE, Chief Baron, WHIDDON, and GRIFFITH, Attorney General, and Myself, thought, that this shall alter no use immediately, for then by no possibility could the covenant ever be performed, and it is in the future tense: but they agreed in a manner, that if I covenant, in consideration of marriage, or for a sum of money paid me, *that the party shall have the said manor of D. by express words*, this shall change an use immediately, for there is no estate to be made.

It was also agreed, that if *cestuy que use* wills that his feoffees should make estate to J. S. in tail or fee, and die, the use changes before the estate be executed, &c.

3. Leon. 75. 5. Mar. 162. a. March. Rep. 50.

3. Bulst. 252. Winch. 36. 61.

[3. Lev. 306. Shep. Touch. 79. So. 489.]

Dier, 55. a. Cro. Jac. 180. 1. Roll. Ab. 604. 568. 570. 21. H. 7. 19. a. 7. El. 235. a. B. N. C. 184. 23. El. 374. a. Infra, 102. a. 166. b. Plow. 308. 387. b. 27. H. 8. 8. b. 15. H. 7. 11. b.

Cestuy que use devises that his feoffees shall make estate, the use changes immediately (a)

(a) *Sed vide* Gilb. Uses, 37. And a devise to trustees to receive rents for the life of

A. to be applied for his subsistence, is not an use executed in A. 2. Term Rep. 444.

Hilary Term, 1. Queen Mary.

Between the Queen and the Duchess of Somerset.

(42) **T**HE Duchess of Somerset, and the Duke her late husband, had lands to the value of one thousand pounds *per annum* assured "*to them and the heirs male of their two bodies begotten*" by purchase [by act of parliament], with divers remainders over; and afterwards the said statute for the attainder of the said Duke for felony was repealed, *saving all titles of jointures or dower of women*. And the question was, Whether the said Duchess should have her dower of the rest of the lands and tenements of the said Duke, or not; or should be barred of it by statute 27. H. 8.

See post. 97. b. pl. 48. S. C.

4. Co. 2. b.

6. Co. 2.

Raft. Uses, 9. fol. 487.
Co. Lit. 24. a. 2. Inst
334. 8. El. 248. a. 228.
[317. post.]

* [96. b.]

c. 10. ? because the said case is not expressed in any of the cases limited and contained in the said statute, because the tail is to the heirs male of their two bodies, &c. See for the exposition of this statute *E. 2. M.* fol. [97. b.] *E. 3. M.* fol. [143] and *E. 2. Eliz.* † fol. . and *T. 3.* † fol. . and *H. 4.* † fol. . twice, and *E. 4.* † fol. . Also of the statute 8. *H. 6.* [c. 9.] conviction of a forcible entry by *non est inform.* pleaded *T. 4. Eliz.* fol. [214. a. b.]. The exposition for the statute of *Egyptians* made 1. and 2. *P.* and *M.* [c. 4]. See *M. 4.* and 5. *Eliz.* † fol. . Also the statute of descents of the disseisor 32. *H. 8.* c. 33. * expounded *M. 4.* and 5. *Eliz.* fol. [219. a.] and *E. 6.* † fol. . and *M. 7.* † fol. . and *M. 7.* and 8. † fol. . and † fol. . And *M. 9.* and 10. fol. [265.] for a certificate of servants' wages, by statute 5. *Eliz.* [c. 4.] And *H. 10.* fol. [271. b.] for land leased for the most part for twenty years of land in tail. And *E. 10.* fol. [275. b.] for excommunication for striking in churchyards before conviction, &c. And *H. 11.* fol. [281. b. 282. a.] for extolling the authority of the bishop and see of *Rome.* And *H. 12. Eliz.* fol. [286. b.] for the third part of the lands of the king's tenants disposed of by act executed in his life, for the advancement of any of his collateral kindred, &c. according to the statutes 32. *H. 8.* [c. 1.] and 35. [*H. 8.* c. 5.] And *H. 12. Eliz.* fol. [287. a.] for outlawries for treason where the persons are out of the kingdom upon the statute 28. *H. 8.* [26. *H. 8.* c. 13.] and 5. and 6. *Ed. 6.* [c. 11.] And *M. 12. Eliz.* † fol. . for more than the third part distrained in ward of the land of the *Earl of Oxford*; and *M. 16.* † fol. . Also the act authorizing the *Marquis of North.* to make leases of the land of his wife *Anne Bouchier* for twenty-two years, whether it shall be intended of leases in reversion, *E. 19. Eliz.* fol. [357. a.] and the same Term, fol. [358. a.] for leases made for years to ecclesiastical persons since the statute 21. *H. 8.* [c. 13.] whether they are void, or not.

Clifford *against* Wariner and Another.

(43) **I**N error by *Clifford against Wariner and Moore*, the writ was into the manor of *Ayshe*, with the appurtenances, and one messuage, one barn, one garden, one orchard, twenty acres of land, forty acres of meadow, three hundred acres of pasture, forty acres of wood, and one hundred acres of junks and heath with the appurtenances in *Ayshe*, which *John late Abbot, &c.* had demised for a term which is not yet expired. And in the declaration it appeared that the demise was in these words: "*All the manor of Ayshe with its appurtenances, as appertaining or belonging to the said manor in houses, arable lands, meadow, pasture (the advowson of the church there, rents of assize, wards, marriages, reliefs, escheats, heriots, perquisites of courts, woods and waters belonging to the said manor excepted and reserved):*" so it appeared that the whole manor was not leased, and therefore the count did not maintain the writ: and also the *habendum* in the deed was only the *said manor with all its appurtenances*, without saying any thing of the other premises; so that this was a lease at will only for the messuage, &c.

(44) Also it appeared in the declaration, that the lease and term ought to commence from the Feast of *Saint Michael the Archangel* next after the decease or death of *Thomas Boydon* and *Margaret* his wife then farmers there, until the end of a term of fifty-one years then next following, &c. And it was averred, "that the said *Thomas B.* and *Margaret* afterwards at *Ayshe* aforesaid died, after whose death the plaintiff entered, &c. and was thereof possessed until the defendants, on the sixth day of *February*, in the sixth year of *Edward* the sixth, with force and arms entered, &c." And here it does not clearly appear whether any Feast of *Saint Michael the Archangel* passed between the deaths of the * said *T. B.* and *M.* as it may be well intended, and then the term shall never commence or take effect as it seems, for they ought both to die before any Feast of *Michaelmas*, or otherwise the words cannot be fulfilled, because they are copulative, for the next *Michaelmas* ought to be after the death of both, as it should seem; therefore, &c. (But this

If he who has a lease to commence at a future day enter before the time limited, he is a disseisor, and his term shall never commence.

[3. Bac. Ab. 447. 1. Str. 550.]

Plow. 23. 6. Co. 35. Dyer, 261.

* [97. a.]

5. Co. 7.

(45) It was said by *Coke, Attorney General*, 3. Jac. B. R. that if a lease be made of a manor except the courts, the exception is void. [Mo. 870. Hob. 108. Sheph. Touch. 77.]

opinion was not allowed by some.) (45) And afterwards in *Easter Term* following it was argued by the Judges, and moved by WHYDDON, that the writ which supposes the demise by the Abbot only does not support the declaration, which supposes the Abbot and Convent to have demised. But BROMELEY and PORTMAN agreed, that it is the demise of the Abbot only in law, and the assent of the Convent. Also the writ supposes that *the Abbot of C. demised*, and the count that *the Abbot of the Monastery of St. Peter the Apostle of C. &c.* and so a variance: and holden by BROMELEY good enough, because he departs with a chattel only, *s.* a term; otherwise would it be of a freehold, &c. Also BROMELEY held the exception of the advowson, land, and rents of assize, void, and that all the services of the manor passed, because they are part of the substance of the manor, and the lease is "*belonging to the manor*," which the rent is not, but parcel, &c. Also he argued that all the land which was in gross besides the said manor was comprised in the *habendum* by the name of the manor, &c. for it may be known by the name of the manor, &c. But as for the error assigned, WHYDDON and BROMELEY held it to be error, and PORTMAN *à contra*; but all agreed that it is out of the statute of Jeofails [32. H. 8. c. 30.], because it is in the substance and foundation of the action; and also the statute does not extend to declarations, &c. because they are not pleading. *Sed quære tamen inde.* (46) And BROMELEY argued, that it might be that *Boydton* and his wife died after the Feast of *Saint Michael*, in the sixth year of King *Edw. 6.* and that the plaintiff entered, who was disseised, and ejected on the sixth of *February*, which cannot be of a term of years: and he put divers cases of uncertain declarations; as in waste brought against a woman, and count of a lease made to her husband and her, and that she did waste, without saying more, this is bad. And so in 2. H. 4. [3. a.] in waste. Also in 21. H. 6. [31. a.] in trespass upon the departure of an apprentice, he ought to shew the commencement of the term of retainer, &c. And afterwards, in *Trinity Term* following, the judgment was reversed upon great deliberation.

Dyer, 40. b. 37. H. 6. 3.

[3. Bac. Ab. 382, 383.]

14. H. 6. 17. a. Dy.
178. a. Plowd. 199.

Dy. 150. a. 10. Co.
126. 2. Ben. 243.

[Shep. Touch. 76. Co.
Lit. 150, 151.]

12. El. 288. b. 172. b.
59. Hob. 170. 1. Cro.
508. Perk. 116.

44. E. 3. 15. 22. 27.
H. 6. 39. 2. Perk.
116. 6. Co. 66.

[5. Co. 35. a. but the
subsequent statutes of
Jeofails do.]

8. Co. 163. Plow. 209.
3. Cro. 766. Moor, 54.

Dy. 297. & 89. Plow.
84. 202. N. B. 36. 1.
59. F. 50. F. 4. 42.
E. 3. 22. b. 22.

21. H. 6. 71. a. 24.

(47) **E**RROR in this, that where the *venire facias* was returnable in a month of *Michaelmas*, a writ of *habeas corpora juratorum* with a *nisi prius* in *London*, was awarded returnable on the octave of *Saint Martin* then next following, not allowing the defendant upon the writ of *venire facias* one essoin or one default (a). Also in this, that the *habeas corpora* was returnable on the octave of *Saint Martin*, unless E. MOUNTAGUE, *Chief Justice* of the Bench, &c. should first come on *Saturday*, s. 19. *November* then next following, to the * *Guildhall* in *London*, and the 18th day of *November* was the first day of the utas, s. the essoin day of the utas of *Saint M.* and the fourth day after inclusive, the 21st day (b): so the taking of the jury and of the verdict after the day of the return is erroneous; and by the opinion of the Court this was holden error; and for this reason the parties agreed. See a good case ruled accordingly *M.* 33. *H. 6.* in Account, fol. 45. [pl. 28.] and entered *M.* 31. *H. 6. Rot.* 516. And in title *Four*, FITZHERBERT, *E. 22. E. 4.* 39. a fine levied has relation to the first day of the return.

If the *venire facias* be returnable in a month from *Michaelmas*, and the *habeas corpora jurat.* on the Octave of *Saint Martin*, it is error. If the *hab. corp. jurat.* be returnable on a general return day, with the *nisi prius* for a day between that and the *quarto die post*, a trial under it is error.

* [97. b.]

1. Co. 162. 3. 31. 33
34. H. 6. 45. 13. 25.
27. b. Dy. 266. b.

(47) *Hil. 30. Eliz. B. R. & Groome v. Ludlow*, by CLENCH, GAWDY, and FENNER, that a writ of enquiry of damages returnable on the Octave of *Saint Michael*, executed by the sheriff on this day, and so returned, was adjudged well executed.

(a) Before 16. Car. 1. c. 6. *Michaelmas* Term began on the Octave of *Saint Michael*. And see 13. Car. 2. ft. 2. c. 2. § 7.

(b) If a writ is returnable on a general return day, and not a day certain, the sheriff needs not return it till the *quarto die post*. *Makepiece v. Dillon*, Fort. 363.

Easter Term, 1. Queen Mary.

Duchess of Somerset's Case.

(48) **M**'EM. That the lady *Anne*, late the wife of *Edward Seymour*, late duke of *Somerset*, had the manors of *Mockhelney Drayton* and six other manors in the county of *Somerset*, of the annual value of one thousand marks, assured to her and her said late husband, and to the heirs male of the bodies of the said duke between him and his said wife

Lands by purchase "to
" A. and his wife, and to
" the heirs male of their
" two bodies begotten,"
is a bar of dower within
the intent, though out
of the letter, of 27. H. 8.
c. 10 §. 6.

Ante, 96. a. pl. 42. S.C.

Dy. 136. b.

wife lawfully begotten, by act of parliament made in 32. H. 8. with divers remainders over, &c. And also she was joined in purchase with the duke in divers other lands of like estate before the making of the said act. And farther it was enacted by the said statute, that all other lands which at any time afterwards come to the said duke by descent, gift, by purchase, or any otherwise, of any estate in fee-simple, should be altered and adjudged thenceforth to be in him in special tail to him and to his said heirs, with the like remainders over. (49) And afterwards the said duke was attainted of felony, and was executed. And afterwards the last part of the said act in the fifth year of *Edw. 6.* was repealed, with a proviso that the said act of repeal should not be prejudicial to any wife for any dower or jointure to which she was lawfully entitled before the act of repeal. And now the said duchess of *Somerſet* sued to the queen for all her jointure, and also for her dower of the residue of the lands of her said husband, because the attainder of her said husband for felony did not exclude her from her dower; and this by statute 1. *Ed. 6. c. 12.* And also whether she should be barred of her dower by the statute of *Uses* 27. *H. 8. c. 10.* (her estate being limited to her and her said husband in tail, and to the heirs male, &c. which is none of the five estates which are first limited in the statute) was moved to all the Judges as a matter of doubt; and it was resolved by them in Trinity Term following, that she should not have her dower and jointure also, nor is the statute to be so understood, but the contrary. *Vide simile, M. 2. M. & fol.*

y. 363, b. Br. Dower,
69. Dy. 228. b. 4. Co.
2. B. N. C. 421.

[Co. Lit. 36. b. 3.
Com. Dig. 133.]

[* 98. a.]

The omission of "supreme head of the church" in the king's title, does not vitiate his writ of summons to parliament.

* (50) A MATTER of great doubt was moved among the Justices and Serjeants, whether the queen's writ of summons of this parliament, in which the title or style of *supreme head of the church of England, &c.* was

(50) & *Harrison* and *Lucan's* case. Replevin was brought against *Harrison alias Davy*, who pleaded that his name was *Harrison* and not *alias Davy*: and adjudged no plea; for *alias Davy* is surplusage. [1. Com. Dig. 29.] 2. *Jac. C. B. & Carter v. Carter*, in an action upon the case where the year of the reign of the king of *Scotland* was mistaken [omitted], outlawry shall not be reversed for the omission of this; for it is surplusage, and no part of the name. But 3. *Jac. B. R.* in an indictment for a forcible entry the year of the reign of the king was omitted, and therefore quashed. *Fox's Martyrology*, fol. 2117. argument by *HALES* against this. [See *Barnes*, 409. and 2. *Hawk. Pl. Cor.* 235.]

omitted,

omitted, was good and sufficient, or whether the whole is void, &c. because the said style is united and annexed by the statutes of 26. [H. 8. c. 1.] and 35. H. 8. [c. 3.] to the imperial crown of this realm, as therein appears. And by the opinion of BROMELEY, BAKER, BROOKE, SAUNDERS, DYER, STAMFORD, the ATTORNEY and SOLICITOR GENERAL, it was holden good enough; for *supreme head* is not parcel of the name of the queen, but addition, &c. And the words of the statutes are only in the affirmative, and none of them negative, that the style should be so written of necessity by the queen, &c. But HARE, PORTMAN, BROWN, WHYDDON, and CAREL, to the contrary. And this doubt was again moved in the first parliament of queen *Elizabeth*, and was resolved upon great deliberation as first above.

[Dal. 14. pl. 4.] } S. C.
Jenk. Cent. 5. }
c. 42.

35. H. 8. c. 3. But
this was repealed by 1.
M. c. 8.

22. H. 6. 7.
10. Co. 126. a.

[See 2. Lev. 223.]

Lord Windfor *versus* St. John et Ux'.

(51) **I**N a writ of right brought by *Lord Windfor* against *St. John* and his wife, the four knights and eleven others of the grand assize appeared in the Bench, xv. *Pasche*, and the demandant appeared also, but the tenants did not appear. And it was moved, Whether the jurors should be called, or only the default of the tenants recorded? And the prothonotaries thought their practice was, that the jurors should not be called, for the inquest shall not be taken by default as in personal actions. Yet *Glanvil* in his Treatise *de Magnâ Assisâ* [lib. 2. c. 16.] is to the contrary. (52) And also it was moved, Whether there ought to be sixteen jurors of the grand assize with the four knights of necessity, or a less number? And it appeared to the Court from divers books and precedents, that a less number than sixteen should not inquire in a writ of right, and yet the writ *de assisâ eligendâ* is directed to four knights *ad eligend. seipfis et aliis, duodecim, &c. Ideo quære inde*. But the greatest doubt was, Whether the demandant should have seisin of the land upon the default without an award of a *petit cape*? for every body agreed that final judgment should be given on the default of

In a writ of right, if the tenant make default after mise joined, the jurors shall not be demanded, but final judgment given; but, Whether the demandant shall have seisin without a *petit cape*? *qu.*

There must be sixteen jurors of the grand assize with the four knights.

Dy. 79. b. Co. Litt. 295. b. 1. E. 3. 12. Dier, 265. Co. Mag. Chart. 447. Dy. 247. b. 33. E. 1. F. Tryal, 97. 39. E. 3. a.

[1. Leon. 303. Booth's Real Act. 97.]

22. E. 3. 18. 7. H. 4. 84. Regist. 8. Finch. fol. 88. 2. H. 7. 8. a.

[3. Black. Com. 194. Booth's Real Act. 65. Carth. 47.]

5. Co. 86. Cro. Jac. 293. Dier, 56. 103. 362.

(52) *Trin.* 30. *Eliz.* between *Heydon* and *Smithick* and his wife, [Goldsb. 90. pl. 1.] only sixteen were sworn in all.

28. *Eliz.* between *Pexal Brocas* and *Sir John Savage*.

Flt. 5. N. 3. E. 3.
Droit. 27. 9. E. 3. 37. b.
Fit. Judgment, 126. 228.
235. 26. H. 8. 8. N. B.
6. 2. 9. E. 4. 34. b.

the demandant, and also on default of the tenant made after joining the mise, because it is peremptory upon both parties. Which see in F. N. B. fol. 4. [11. N.] at the end of a writ of right. (53) Also in 4. E. 2. and M. 5. E. 3. 27. and M. 9. E. 3. 18. and E. 11. E. 3. 2. [1. E. 3. 12.] against a *feme covert*: and also 44. E. 3. fol. 22. [28. a.] against a *feme covert*: but there she was received by default, upon default of her husband after they had both joined in the mise, and a joinder of the mise anew that she had more right, &c. and then she made default, and final judgment was thereupon given. And see a good case in E. 8. E. 3. 8. [25. b.] where final judgment was given against the husband and wife upon their default after the mise joined, without awarding a *petit cape*: and it is there said, that it was usual to award a *petit cape* in such cases; with which accords 12. H. 7. [10. b.] a good case: by advice of VAVISOR and other Judges*, upon a default recorded at *nisi prius*, at the day in bank, the tenant made default, and the demandant had a *petit cape*. See more of this case, *Michaelmas* next, fol. 103. [b. pl. 8.]

22. E. 3. 17. 8. E. 3.
195. Fit. Judgment,
129. 151, 152.

32. E. 3. Judgment, 14.
1. E. 3. 1. Cro. 586.

* [98. b.]

More against Uvedale.

Partition being made by deed before 31. H. 8. c. 1. between the alience of one coparcener in tail and A. the other coparcener, if it be unequal, the issue of A. may defeat it: but if equal, *quod*. If A. afterwards grant her part to the alience, and die, a release to him with warranty by the issue is not a discontinuance.

(54) TWO coparceners of land in tail: one of them enfeoffed a stranger of all that to him belongs, and then the other, and the feoffee by deed indented in the eighteenth year of H. 8. made partition. And each party appointed to the other in severalty in such words, *that each of them granted for himself and his heirs to the other and his heirs*; and by the same deed the coparcener in tail enfeoffed the said stranger in fee by a letter of attorney to make livery, &c. And the coparcener in tail had issue, and died; and the issue released all his right, interest, and demand unto the other with warranty, in all those lands and tenements in S. which A. B. his father gave and granted to the other and his heirs by his deed dated *anna* 18, &c. and had issue and died; and his issue entered upon the stranger into the part which was allotted and assigned by the partition to the said stranger, claiming the moiety of it; and the stranger brought trespass upon the statute [5. R. 2. c. 7.] *ubi ingressus non datur per legem* against him; and he pleaded that

Co Lit. 169. 172. 339.
22. R. 2. Discontinu-
ance, 50.

Co. Lit. 173. b. 174. a.

he did not enter against the form of the statute. (55) And the opinion of the Court was, that if the partition is not equal, it is clear that the issue of tenant in tail may defeat it: but *quære* if it be equal; for the tenant in tail was not compellable by the feoffee of his coparcener at that day to make partition, wherefore, &c. but the feoffee was compellable by the tenant in tail, &c. But *quære*, Whether the said release with warranty, if it extend to the part of the feoffee (as it does not, if made by the issue who never was seised by force of the intail), be a discontinuance? As if tenant in tail be disseised and die, and his son release to the disseisor with warranty, and have issue, and die, the issue may enter; and SAUNDERS thought not.

Lit. 56. a. 58. a. 135. b.

[Co. Lit. 175. a. 3. Bac. Ab. 211.]

22. 37 H. 6. 25. 8. Benlo. pl. 8. 24. E. 3. Partition, 14. 21. E. 4. 81. 12. E. 4. 11. 2. Request, 70. 3. Co. 150. Co. Lit. 339. Br. Discents, 21.

[Lit. § 637. 641. Co. Lit. 178. a. Bull. Ni. Pr. 100.]

Sir Nicholas Throgmorton's Case.

(56) **N**OTE, That it was declared at the arraignment of *Sir Nicholas Throgmorton*, and also in the star-chamber, to the jury who acquitted him of the treason and conspiracy with *Wyatt* in levying war, by the opinions of the Judges, That if two or more conspire to commit treason, as in levying war, and any of them afterwards put it in execution, that is treason in all, and this by the common law before the declaration made in 25. E. 3. stat. 5. c. 2.

Where two conspire to commit treason, and one only executes it, both are traitors, and this at common law before the statute 25. E. 3. stat. 5. c. 2. 1. St. Tr. 63. S.C.

R. 675. 678. St. Jo. Argument, 14. 3. Inst. 9.

[Dal. 15. pl. 5. Fost. C.L. 213. 1. H.H.P.C. 133.]

(56) See the argument upon the bill of attainder of *Thomas Earl of Strafford* by ST. JOHN, *Solicitor General*, an. 1641. fol. 26. a good exposition of the statute 25. E. 3. st. 5. c. 2.

Milton against Eldrington.

(57) **A** FIERI FACIAS was directed to the sheriff of *Middlesex*, who returned that he had taken the goods and chattels of the defendant to the value of part of

The plaintiff may have a *venditioni exponas* to the sheriff to sell goods seised under a *feri facias*, if

(57) T. 42. Eliz. In debt against *Welsh, C. B.* the plaintiff had judgment, and an *elegit*, and took the goods in execution; and a *superfedeas* was delivered to the sheriff, wherefore he re-delivered the goods to *Welsh*, and returned, that no one came on the part of the plaintiff to take the goods when they were in his possession, and that by virtue of the *superfedeas* he had delivered them back to the owner; and *per Cur'* he must amend his return at his peril, for he cannot re-deliver the goods, because the *superfedeas* is only from further execution.

H. 48. Eliz. *Charter v. Peter, B. R.* [Cro. Eliz. 597. and Moore, 542. pl. 718.] The sheriff took goods in execution upon a *feri facias*, but before the sale the defendant brought error, and a *superfedeas* had to the sheriff to stay execution if it were not in any manner done; notwithstanding this a *venditioni exponas* was awarded, for execution was in some measure begun.

the *superfideas* upon error brought be not delivered till after such seizure.

Dier, 144. Mod. Rep. 30. 2. Saund. 47. 2. Ro. Ab. 491, 492. F. N. B. 133.

2. H. 7. 12.

Mod. Rep. 30.

R. 344.

3. E. 6. 67. b. 2. Keb. 589.

[Salk. 322. 1. Burr. 34. 1. Black. 69. 2. Term Rep. 44. 183. And see 4. Term Rep. 402.]

the debt, and that they remained in his custody for default of purchasers, and that before the return of this writ, a writ *de non molestand.* was directed that he should cease from further execution; which writ he returned annexed to the *feri facias*; and this writ of *non molestand.* * was awarded in the Bench by reason of a writ of error there brought by the defendant; but the record was never removed, because the return of the writ of error was on the morrow of the Ascension, and not before, and the *feri facias* was returned xv. *Pasche*. And it was much argued, whether the writ of *venditioni exponas* should be awarded in this case or not, because the writ of execution was not served, or the property of the goods altered notwithstanding the seizure. And yet at length the writ of *venditioni exponas* was awarded by SAUNDERS and BROWNE.

Cases in the Course of our Circuit last Lent.

Indictment for "bur-
glariously breaking open
a church by night to
steal the goods of the
parishioners," is bad,
for want of the words
"and entering;" but it
is burglary.

3. Inst. 64. 22. E. 3. Coron. 264. Stamf. Prerog. 30. Lamb. J. P. Lib. 2. fol. 261. 2. Poult. 132. pl. 30, 31. Crompt. 25. 28. H. 8. 26. b. 22. Aff. 39. 95. 127. Aff. 38. 29. Aff. 44. Fulb. Paral. Lib. 1. fol. 104. [Leach Cas C. L. 342. 1. Hawk. P. C. 160. Foster, 108. 2. H. H. P. C. 184. 1. Hawk. 145. 2. H. H. P. C. 181.]

(58) *E. 5. Jac. & Fielding's case, B. R.* it was adjudged that the word "entered" was not necessary in the indictment. See Crompton's Justice of the Peace, title Burglary.

An accessory in horse-stealing admitted to his clergy.

11. Co. 37. a. Stamf. 125. 2. Stat. 2. & 3. E. 6. c. 33. tolled by stat. 31. El. c. 12. Poult. 210. pl. 25. But now 31. El. c. 12. ousts all accessories before and after. [2. H. H. P. C. 365. Fost. C. L. 372, 373.]

(59) CLERGY was allowed to an accessory to stealing horses and mares; and well, because the statute [1. E. 6. c. 12.] shall be taken strictly, and it speaks expressly of the principal only, by the opinion of the Judges.

(59) *M. 14. H. 4. B. R. at Westminster, Rot. 28. & William Baldery, churchwarden of the parish of St. Michael of Hutebeam, appeals Nicholas Bern, for that he, by night, &c. feloniously stole one silver chalice, one missal, one surplice (and several other things), to the value, &c. of the goods of the said church, who pleads not guilty; but by the jury he was found guilty, and he prays to be admitted to his clergy, and he is delivered to the ordinary.* Note, 11. H. 4. 12. Accord. Bro. Appeal, 31. 90. 12. H. 7. 27.

(60) ONE

(60) **O**NE was put into the stocks on a suspicion of felony, and there came another, who let him go at large; this is felony by the common law, *de frangentibus prisonam*, although the party who escaped was not indicted of felony.

Releasing a suspected felon from the stocks, is felony by the common law, though he be not indicted.

Stamf. 30. b. 11. H. 4. 22. b. 43. E. 3. 36. a. 8. a. 4. E. 3. 49. H. 6.

11. a. Flo. 401. 1. E. 3. 16. b. contr. 2. E. 3. Coron. 158. 9. E. 4. 1. b. 2. Inf. 592. cont. 8. E. 3. 13. although he be indicted. [2. Hawk. P. C. 192. 1. H. H. P. C. 609. See 16. Geo. 2. c. 31. and Leach's Cr. Law. 100.]

(61) **A**LSO an indictment, that he feloniously took the goods and chattels of a certain person unknown was holden by several Judges well enough, and of common course, because it may be the goods are carried into another county, so that the proper owner cannot be known. And so it is of the death of a certain person unknown, in [22.] Lib. Ass. [pl. 94.] But PORTMAN said, there was a difference.

Indictment for taking the goods "of a certain person unknown" is good.

11. El. 285. a. Flo. 85. b. 8. H. 5. 5. a. Dier, 187. Cro. 26. Flo. 125. 1. E. 3. 26. b. Stamf. 95. b. 9. E. 4. 1. 1. Ass. 7. 9. H. 6. 45. b. 38. Ass. 11.

[1. Hawk. P. C. 144. 2. Hawk. 329, 330. 2. H. H. P. C. 181.]

(62) **A**ND it was doubted by what warrant the Justices of assize hold plea of appeals of robbery; and all there thought by the commission of gaol delivery. But in appeal of murder, the statute 3. Hen. 7. [c. 1.] gives them power by express words.

Justices of assize hold plea of appeal of robbery by the commission of gaol delivery, and of murder by 3. Hen. 7. c. 1.

Stamf. 159. 169. d. Dier, 120. Co. Lit. 263. 10. E. 4. 14.

[2. Hawk. P. C. 32, 33, 39, 40.]

(63) **A**LSO, Whether an indictment of murder or manslaughter ought to aver expressly a stroke supposed, s. on such a day and year feloniously, and of malice aforethought, *killed and murdered, &c.* without saying "*struck.*"

Whether the word "*struck*" must be in an indictment for murder? *qu.*

Ante, 69. a. 1. Bullst. 144. 5. Co. 123. a. 116.

[1. H. H. P. C. 184. 2. Hawk. P. C. 260.]

(64) **A**LSO, there was a case where the husband made a feoffment at this day to the use of his wife for life, and after her decease to the use of the right * heirs of the body of the husband and wife begotten, without saying any thing more

* [99 b.]

If A. make a feoffment to the use of his wife for life, remainder to the heirs of their two bodies begotten, the issue cannot enter during the life of A.

1. Leon. 102. Styl. 325.
 Dier, 111. b. 134. Peik.
 12. a. 1. 6. Co. 10.
 4. a. 66. 24. Eliz. re-
 solved that he shall not.
 [Prec. in Ch. 462. Co.
 Lit. 26. a. Mr. Har-
 grave's note (3). 2.
 Black. Rep. 730, 731.
 732. Fearn Cont. Rem.
 4th edit. 44.]

more of the fee-simple of the use; the husband and wife had issue, and the wife died: *Quere*, Whether the issue may enter in the life of the father, or not? and, Whether he may after his decease? And as it seemed, he shall not, because he cannot be right heir of the body of his father, living the father.

If a general pardon in-
 tervene between the
 stroke and the death,
 Whether the felony be
 discharged by it? *qu.*
 11. H. 4. 12. 1. E. 3.
 16. b. Dier, 68. b. 5.
 Co. 49. b.

Plow. 401. a.

[Fosk. Cr. L. 65, 66, 67.]

(65) **A**LSO, the indictment was of the death of a man, but not of malice afore-thought, or by murder; and the stroke was supposed to have been given 15th September, in the first year of the now queen, and that he languished until the third day of October then next following, on which third day of the stroke aforesaid he died; and a general pardon was made at the coronation in the mean time, s. on the 1st of October: Whether the felony is discharged by this pardon?

The property of stolen
 goods is not altered by
 the completion made in
 market overt of a con-
 tract made out of it,
 with election of after-
 refusal in the buyer.

2. Rol. Ab. 124.

1. Sid. 438.

34, 35. H. 6. 29. 29. 7.
 H. 7. 12. 12. E. 4. 8.
 Dr. & Stu. 149. Co.
 Mag. Chart. 713.
 14. H. 8. 17. b. 22.

(66) **A**MAN bought certain beasts which were feloniously stolen on the Thursday night at Northampton for a certain price (and the buyer was to have the election of liking or misliking the next day before noon), and he paid to the seller immediately a crown in earnest; and on the morrow in open market he agreed to his bargain, and paid the whole money, and also paid toll for the beasts: Whether the property be changed or not? was much debated upon the evidence. And SAUNDERS, BROOK, and WHYDON, and others, thought that the property is not changed, because the bargain was made out of the market (s. overnight), and the assent given afterwards shall have relation to the first communication; for it seems the seller was com-

(66) *M. 40, 41. Eliz. B. R. Sir Jarvis Clifton* brought an action upon the case of trover and conversion of certain jewels against *Chandler* [Moore, 624. 2. Rol. Ab. 122. §. 1, 2]; and there resolved, by GAWDY, FENNER, and POPHAM, that the sale of goods in any shop or house in any city does not alter the property, for no one can come into my shop against my will to see whether any sale be made, and it ought to be open as well to the seizure as to the view. So also was it resolved in the case of *Taylor v. Chambers, E. 3. Jac. B. R.* [Cro. Jac. 68.] that the sale of goods in London which alters the property must be in the outer part of the shop, so that they who pass by may see it.

It was resolved by all the Judges, 9. *Jac. C. B. & Frogmer's case*, That if a man steal plate or other goods, and take them to a goldsmith or other person, and say "I have a piece of plate," and he view it, and contract for part; although the plate be afterwards [delivered] in market overt, yet the property is not altered in law if it were sold behind a hanging, or in an upper room, for that is not a market overt.

pletely bound to the contract on his part, and could not start from it, but he had given power to the buyer to mislike.

[2. Hawk. P. C. 250, 251. 1. H. H. P. C. 542, 543. 2. Term Rep. 755, 756. And see 1. Wilk. 8.]

Thomas's Case.

(67) NOTE, in the arraignment of *William Thomas* for treason in compassing and imagining the death of the queen, it was agreed by the Judges, that although he was an esquire, he might and ought to be tried by common merchants, or other good and lawful men who can expend forty shillings of freehold, or if it be in chattels, one hundred pounds: such may be on the jury for treason, &c. (a) And so the statute [25. E. 3. st. 5. c. 2.] which speaks of people of their condition has been put in use at all times.

All persons having forty shillings freehold, or one hundred pounds in chattels, are sufficient *parcs* for the trial of an esquire for treason.

Poulk. 198. pl. 1. Dy. 131, 132. a. 286. b. Stat. 1. E. 6. c. 12.

(a) By 3. Geo. 2. c. 25. §. 20. the qualification of jurors in capital cases shall be the same as in civil causes, for which see 4. and

5. *William and Mary*, c. 24. and 3. Geo. 2. c. 25. §. 18, 19.

Thomas's Case.

(68) ALSO, it was there holden for law, that of two accusors, if one be an accuser of his own knowledge, or of his own hearing, and he relate it to another, the other may well be an accuser: and thus did *Sir Nicholas Arnold*, who accused *William Thomas* of words which founded and tended to the death and destruction of the queen, of his own hearing, and at the request of *William Thomas*, he reported over the said matter to *Sir James Crofts*; *Sir J. C.* may be an accuser in this case with *Arnold*. And *Sir James Crofts* reports this over to *John Fitzwilliams*, who was supposed a man fit to have killed the queen, and he reports it over to *Sir Thomas Wyatt*, &c. * so each of them may be an accuser. See who may be adjudged a good witness in treason, *M.* 13. Eliz. fol.

One witness of his own knowledge, and another by hearsay from him, though at the third or fourth hand, are two sufficient witnesses in high treason.

Stamf. 164. a. Stat. 5. & 6. E. 6. c. 11.

13. Eliz. c. 1.

Co. Pla. Coron. 25. q.

[1. H. H. P. C. 306. 2. Hawk. 365. Fost. 234. &c. cont.]

* [100. a.]

(68) *E.* 20. Jac. star-chamber. In an information against *Newton* a grocer for deceiving his customers, it was agreed by the two Chief Justices concerning the testimony of one as follows, s. When two or three offences are proved by single witnesses, s. one witness to each offence, a single witness suffices if they be both offences of the same species, and against the same party, otherwise not.

Trinity Term,

1. Queen Mary.

If an exemption of the vill be pleaded within time of memory, in a challenge to the hundred, it must be shewn how exempted.

[Vide ante, fol. 25. a. pl. 156. note (6).]

10. H. 6. 5.

(69) **I**N *B. R.* a juror was challenged for the hundred by the defendants, because he had nothing within the hundred of *Morden*, within which, &c. nor at the time of the arraying of the said panel, or at any time afterwards, had, nor dwells, nor at the time of the arraying of the said panel, or at any time afterwards, did dwell in the said hundred, and this, &c.; to which the plaintiff replied, that the juror at the time of the arraying of the said panel dwelt in the vill of *Wallingford*, in the county aforesaid, which is, and at the time, &c. was within the hundred of *M.* aforesaid, and this, &c. To which the defendant rejoined, that the vill of *W.* is, and from time whereof, &c. was a franchise, and wholly exempt from the said hundred during all the time aforesaid; and that the inhabitants of the said vill, and the inhabitants within the said hundred, never united themselves or met at any court, or were sworn upon any jury together, during all the time aforesaid, and this, &c. And upon this the plaintiff demurred in law, and the challenge was disallowed, and the juror sworn. And the opinion of *BROMELEY, Chief Justice*, was, Because it was confessed that *W.* was once within the hundred of *M.* and if it had been exempted since time of memory, it should be shewn how, and by what means; wherefore, &c.

If the king grant land to the men of *I.* without an *habendum* to them, their heirs, and successors, rendering a rent, they become a corporation perpetual to this single intent; but they are only tenants at will, and if the king release the rent, it is a dissolution *ipso facto*.

10. Co. 30. b. 44. E. 3. 4. a. 2. 17. H. 4. 7. 10. 8. H. 5. 6. Noy, 54. 7. E. 4. 14. a.

(70) **N**OTE, It was holden for law in the star-chamber, by *BROMELEY, Chief Justice*, *SIR JOHN BAKER*, and others, that if the queen at this day would grant land by her charter to the good men of *Islington*, without saying, to have to them, their heirs, and successors, rendering a rent, this is a good corporation for ever to this intent alone, and not to any other, because there is a rent reserved, &c. But then it seems, they are only tenants at will: and if the queen release

release or grant to them the said rent and fee farm, it should seem the corporation is dissolved *ipso facto*, for the rent and farm was the cause which enabled the corporation, &c.
Ideo quære.

26. H. 6. Nonability,
13. 3. Leon. 202. Rol.
Contin. 155. 1. Rol.
Ab. 860. 7. E. 4. 30. a.
21. E. 4. 56. a. 5. E.
4. 8. 17. E. 3. 45.
Davis, 43. 14. H. 8.
16. Dy. 270.
[1. Bac. Ab. 501. 2.
Term Rep. 672.]

(71) UPON a writ of *elegit*, the sheriff returned, that
“he had delivered to the plaintiff the goods and
“chattels of the defendant to the value of twenty pounds, by
“a reasonable appraisement; and shewed the goods in cer-
“tain, and also that he had delivered twenty acres of land of
“the defendants, which is a moiety of all the lands by a *
“reasonable extent;” and he returned no inquisition, s. “by
“the oaths of twelve good and lawful men, &c.” for the
writ does not command him so to do, but only by a reasonable
appraisement and extent. But the Court seemed to think that
it ought to be by inquest, for the sheriff himself cannot ex-
tend it, &c. The precedents are accordingly, which see
+ *Lib. Int. fol. 11. and T. + 15. E. 3. 8.* And this matter
was also moved in the king’s bench, *Mich. Term, 5. & 6.*
P. & M. and the precedents there searched, and they were
all by the oaths of twelve, &c.

The sheriff to an *elegit*
must return an inqui-
sition.

[Dal. 28. pl. 1.]
4. Co. 65. a. 74. b. 2.
Inst. 396. 2. Bullst. 97.

* [100. b.]

5. Co. 90. 4. Co. 74.
3. Cro. 584.

Lib. de Ent. fol. 245.
Elegit, 3, 4, 5. *Action.*

[Dalt. Sheriff, 231,
232. Impey Off. of
Sheriff, 481.]

(71) Where execution is to be made by the sheriff alone, it ought not to be returned;
but in case of an *elegit*, because it is intended to be made by inquest, and not by the sheriff
alone, this ought to be returned, otherwise it is bad. 5. Co. *Hoc’s Case*, 90. a. 4. Co. 67.
Fitzwood’s Case, and 74. *Palmer’s Case*.

Culpeper against Bushe.

(72) KING Henry the eighth being seised in fee of the
manor of *Yanworth*, in the county of *Gloucester*,
by his letters patent, bearing date the 12th day of *April*, in
the 32d year of his reign, granted the same manor to *Thomas*
Culpeper, younger brother to the said *Culpeper*, and to the
heirs male of his body, remainder over in tail to the said
Culpeper in the same manner, reserving a tenure *in capite*,
and also a rent, and the fee-simple. And afterwards, s. in
November 33. H. 8. the said *Thomas Culpeper* was attainted
of treason, and executed immediately, leaving no issue of his

Grant by the king to
T. C. in tail, remainder to
G. C. in tail; that *T. C.*
was attainted of treason
and executed, leaving
no issue (all remain-
ders, &c. of strangers
being saved by act of
parliament) and that
after the said act the
king granted to *A.* a
good evidence to sup-
port a traverse by *G. C.*
of the king’s being seised

body;

in fee at the time of the second grant to A.

[12. Vin. 251. (T. b.) 107. pl. 1.]

The plaintiff in a writ of entry *sur disseisin* in the nature of assize, having declared on a *seisin in fee*, it was amended to a *seisin in freehold*, which well supports his estate tail.

Could. 20.

Roll. Cont. 340.

1. Keb 396. *

Flow. 436.

body; which attainder was confirmed by act of parliament, 33. H. 8. c. 21.; by which act all such rights, titles, interests, use, and possession, as he had in any manors, lands, and hereditaments, since the 25th day of *August* before the attainder, were forfeited to the king and his heirs, and adjudged, deemed, and vested, by the same act, to be in the real and actual seisin and possession of the king without office, with a saving to all persons and to their heirs (other than the said person attainted and his heirs, claiming as heirs by or from him) all such right, title, use, possession, interest, reversion, remainder, entries, &c. as they might, should, or ought to have had, if the act had never been made. (73) And afterwards, the said king continuing his possession after the death of the said *Thomas Culpeper*, so dying without issue, gave and granted the said manor by letters patent in the 36th year of his reign to one *Strode, Erle*, and others in fee (reserving a rent and tenure *in capite*), who aliened their estate to *Bushe* in fee. And afterwards, the said *Culpeper* the elder, who was brother and heir to the said *Thomas* who was attainted, as into his said remainder entered upon *Bushe*, and he re-ousted him; upon which *Culpeper* brought a writ of entry *sur disseisin* in the nature of an assize, and declared upon a *seisin in fee-simple* in his count, which was ill. And *Bushe* shewed all the matter, and prayed aid of king *Edward 6.* and shewed the descent of the feigniory to him; and the aid was granted, and four writs of *search* also in the chancery; and pending the matter undiscussed, a writ of *mandamus* was * awarded at the suit of *Bushe* after the death of the said *T. Culpeper*. And it was found by office before the escheator, that the said king *Henry 8.* made a grant of the said manor in tail *ut supra* to the said *T. C.* by his letters patent, bearing date the 12th day of *April*, in the 33d year of his reign, which was false, without finding any thing of the remainder over in tail, according to the truth. (74) And further, the attainder and execution was found *ut supra*, and that he died without issue, whereby the said king was seised in fee, and being so seised, made the grant to *Strode* and others *ut supra*. And then a writ *de melius inquirend.* was awarded; and by office upon this, the

[Doct. Plac. 288.]

Dy. 320. a.

* [101. a]

† Aid shall be granted, First. Where rent is reserved, 2. H. 7. 11. 11. H. 4. 87. pl. 37. 45. E. 3. 23. 46. E. 3. 6. Secondly, Where the feigniory is to be devoted, 35. H. 6. 56. Thirdly, Where *dedi* is in the charter. Fourthly, Where there is a clause of warranty. Fifthly, Where there may be loss. 2. H. 7. 13. pl. 18. 15. H. 7. 10. 7. H. 4. 2. 2. H. 7. 7. b. pl. 23. 37. H. 6. 28. pl. 6. 28. Aff. pl. 39. [Com. Dig. Aide. (B.)]

true date of the first letters patent and the gift in tail *ut supra* 8. Co. 169. were found, without saying any thing of the remainder over: and it was further found, that the attainder was in *November*, in the 32d year, and execution accordingly, which was false. And it was further found, as in the former office, &c. which offices were returned into chancery. And on account of these false offices, it was long debated among the Judges at *Serjeants'-Inn*, whether a *procedendo* should be awarded to the Judges of the Bench in this case or not; or whether *Culpeper* should be driven to his *petition* or *monstrans de droit* for his remainder? 3. H. 7. 3. a.

(75) And it was at length agreed, that because it appeared by matter upon the face of the offices, that by no possibility they could be true, inasmuch as it appears that as the dates are alleged, *T. C.* must have been dead at the time of the grant made to him, by reason of the change of the year of the reign of the said king *Henry 8.* which was on the 22d day of *April*, a *procedendo* was awarded: and thereupon *Bushe* pleaded in bar the letters patent *ut supra*, and *Culpeper* the former letters patent made to his said younger brother, remainder to himself in tail, and that his said brother was dead without issue male, wherefore he entered as into his remainder, and was seised until disseised by *Bushe*, and took a traverse, *s. without this, that the said king Henry was seised of the manor aforesaid in his demesne as of fee, at the time of the making of the said letters patent granted to the said Strode and others*; and upon this they were at issue. (76) *Quære bene*, Whether the matter in law will not well maintain this issue for *Culpeper*? And it seems it will, since the king at the time of the second grant had the fee-simple in reversion; yet he was not seised *in his demesne as of fee*, for although during the life of *T. C.* who was attainted, he had an estate and right in the fee determinable, yet when he was dead without issue, the remainder vests immediately in *Culpeper*, and was saved to him by the act of parliament above, and also his entry, &c. And note, that the count in the said writ of entry, which says that *Culpeper* was seised *in his demesne as of fee*, and took the esplees, was amended and made "*as of freehold*;" and this maintains and serves for an estate tail, and for life by *Fitz. N. B.* [443. A. & note (a)] and by 33. H. 6. [14. b. pl. 5.] and afterwards at *nisi prius*, the

In aid prayer of the king, an office finding a title which is impossible on the face of it, the other party shall have a *procedendo* without being driven to his petition or *monstrans de droit*.

Dy. 122. b. 139. a. 325. b. 4. E. 4. 5. 10. H. 6. 15. a. 2. Inst. 269. post. 209. b. 256. a. [4. Com. Dig. 458. 3. Black. Com. 256.]

10. Co. 98. Plow. 191. a. 230. 241. a. Dy. 155. 344.

17. El. 343. a.

[Hen. Bl. 1.]

15. H. 7. 6. b.

33. H. 6. 16.

18. E. 4. 17.

[Doctr. Plac. 288.]

defendant

N. B. 153.

7. R. 2. Ayd. de Roy.

61.

9. H. 6. 40. a.

3. Aff. 1.

8. 11. H. 4. 21. a. 86. b.

2. Inst. 169.

Dy. 209. b.

12. H. 6. Procedendo,

94. 6 E. 3. 20. a.

26. E. 3. 58. b.

Procedendo, 10.

defendant *relictâ verificatione cognovit actionem*. But the jury which appeared was not * suffered to enquire of the damages. But *quare* for what reason. (77) It was also moved in the *Michaelmas Term* following, that the Judges ought not to proceed to judgment without a new writ of *procedendo ad iudicium*, in which case the record ought to be again removed into chancery, with all that has been done upon it. And because of the doubts of the Judges, the whole record was removed back into chancery in *Mich. Term*, 1. & 2. *Pb. & M.* because the first *procedendo* was only, *that the Justices should proceed in the aforesaid plaint to speedy justice, notwithstanding the said allegation*, without any words of the judgment, &c. wherefore, &c. (78) And see the like, *T. 17. H. 6. Rot. 121.* in assise, where aid was granted of the king, and afterwards a *procedendo* came to them with this clause, "*so that however ye in no wise proceed to judgment without advising with us,*" and then after a verdict found for the plaintiff, a new *procedendo* was purchased, reciting all the matter, to proceed to judgment, and so they did. But as I believe, if the *procedendo* be "*in the plaint aforesaid,*" or "*upon the plea aforesaid,*" although it have not those words "*to judgment;*" yet if the said words of restraint, s. "*so that ye in no wise proceed to judgment without advising with us,*" be not in the writ, the Justices may well proceed to judgment. Yet FITZHERBERT thinks the contrary in his N. B. 153. E. and the Justices would not venture to proceed to judgment, without a new writ expressly that they should proceed to judgment. 26. E. 3. fol. 4. [pl. 14.] a good case in dower, where the heir of the husband was vouched in ward of the king, &c.

Marmaduke Constable's Case.

The grandfather and father, in consideration of the son's marriage, covenant that lands immediately after their deaths should descend and come to the son in tail, and that the grandfather should enfeoff to those uses: the marriage was had, and settlement made ac-

(79) GRANDFATHER, father, and son: the grandfather was seised of certain lands in fee, and being so seised before the statute 27. H. 8. [c. 10.] he, with the father, covenanted and granted by indenture with one D. in consideration of a marriage to be had between the said son and the daughter of D. and for a certain sum of money, that the said lands immediately after their deceases and the deceases

ceases of their wives, that they then had, or that in future they should happen to have, *should descend and come to the said son and his heirs for ever*, without any alienation, or estate by them or either of them to be made for a longer term than during their lives: and further they covenanted, that before a certain day, and after the marriage had, the said grandfather should make a feoffment of the said lands to certain persons by name, in fee-simple to the use and true intent of the performance of every article and covenant in the said indenture contained: and the marriage took effect accordingly: and afterwards before the day, the grandfather made the feoffment of the aforesaid lands to the said persons in fee, to the use and intent underwritten, *s. that the said lands and tenements, after the death * of the said grandfather the feoffor, and of the said father and his wife, should descend, remain, and come to the said son and his heirs, according to the true intent of the said indenture.* (80) And afterwards, before the statute of Uses, the grandfather died, the feoffees being seised as above; and then the father entered upon the possession of the feoffees, and continually took the profits before and after the statute, until he was attainted of treason and executed in the 20th year of *H. 8.* And this was by attainder at common law, and also by statute. And the survivors of the feoffees brought a petition of right to the use of the son, supposing themselves to have been disseised by the said father who was attainted: and nothing came of the petition after much argument. And afterwards, in *Hilary Term, 6. Eliz. at Hertford*, the case was delivered to the Judges by *GERRARD, Attorney General*, for *Rober: Constable*, servant to *Lord Robert Dudley*, by order of the queen, in this form, *s.*

cordingly; the grandfather dying, and the father being executed for treason after the statute of Uses, a petition of right is brought by the feoffees: Whether the said use was in them in tail by this indenture?

Dy. 235. Plow. 4.

* [102. a.]

1. Co. 126.

21. H. 7. 18. Dy. 552.
88.

Poph. 22.

(81) Grandfather, father, and son; the grandfather is tenant for life in an use, remainder or reversion to the father in use; and they two covenant and grant by indenture, in consideration of the marriage of the son with the daughter of *A. B.* that all their manors, &c. that they or either of them have, &c. immediately after their deaths, *shall descend, remain, and come in possession, or in use, to the said son, and the heirs of his body lawfully begotten, &c.* Proviso, that they shall have liberty, by declaration of their will, to make jointures to their wives, or pay ransoms, &c. with a covenant or agreement between the parties to the indenture, *that all per-*

Ante, 96 a.
Dy. 162. a. 235. a.
B. N. C. 184.

Plow. 308. Dy. 85.

[1. And. 25. See Vin. Tit. Uses, (O. 4.) & (S. a.) 5. Bac. Ab. 365, 366. Shep. Touch. 489.]

sons who then were seised, or should afterwards become seised of the premises, should be from that time forwards, and stand seised to the said uses and intents, and to the performance of the said covenants comprised in the said indenture: and the marriage was executed accordingly: Whether the said use was in the son in tail by this indenture, or not, was the question?

Lord Barkley's Case.

Where *A.* tenant *in capite* levies a fine, and takes back an estate in tail, remainder to the king in tail male, remainder to his own right heirs, and dies without issue; upon failure of the king's issue male, the right heir of *A.* shall be in ward to the succeeding king.

Plow. 227. a.

34. Aff. 15. 11. 13. H. 7. 12. 8. 1. H. 4. 3. 33. H. 8. B. N. C. 313.

16. E. 3. Voucher, 88. 8. Aff. 6. Plow. 223. Co. Lit. §. 562. 13. E. 4. 10. b.

* [102. b.]

(82) *WILLIAM Lord Marquis Barkley* levied a fine *come ceo*, &c. of the manor of *Barkley* to one *Legg*, by which fine *Legg* rendered the said manor to the said *Lord Marquis*, and the heirs of his body lawfully begotten, remainder over to king *Henry 7.* and the heirs male of his body lawfully begotten; and for default of such issue, remainder over to the right heirs of the said *Marquis*. The *Lord Marquis* entered into the said manor, and died without issue, after whose death king *H. 7.* entered, and was seised in tail *ut supra*, and died seised; and it descended to king *H. 8.* from him to king *Ed. 6.* who entered and died without issue, by reason whereof the remainder came to the present *Lord Barkley*, as cousin and heir to the said *Marquis*, being yet within age, in ward of the queen, and the said manor holden of the queen *in capite*, by knight service: Whether the manor should be in ward to the queen, by reason that the seigniority was suspended in king *Edw. 6th* at his death, &c.? And at last it was resolved by all the Judges, that the queen should have the * ward(a), not by her prerogative, because other lands were holden *in capite*, but by reason of the tenure, which is revived by the death of the last king in the person

(82) If land be given in tail to one and his heirs female to hold by knight-service, and afterwards the reversion be granted to the donee and his heirs, afterwards the donee has issue a son and daughter, and dies, the daughter being within age, the son shall have the ward on account of the reversion. So if tenant in tail enfeoff his donor, who gives the land in tail to the donee, remainder in fee to another, the donee is tenant by the new estate tail; but when he dies, his son shall be in of the old estate tail, and the reversioner shall have the ward.

If there be lord and tenant, and the lord disseise his tenant, and [the tenant] die before entry, his son being within age, who re-enters upon the lord; in this case, the lord shall have the ward, and yet in none of these cases is he dead seised in the homage of the lord; but because of the death of the donees in the first cases, and re-entry here, the seigniories are revived.

(a) Wardship, with the other consequences of the feudal tenures, was abolished | by 12. Car. 2. c. 24.

1. and 2. Philip and Mary.

Fulmerston *against* Stuard.

B. R. E. 6. E. 6.

(1) A LEASE was made by the late master and fellows of the late college of *Rushworth* in the county of *Norfolk*, 6. H. 8. for a term of sixty years; the lessee granted all his estate and interest to one *Stuard*; and he being possessed thereof within a year before the making of the statute 31. H. 8. [c. 13.] took a new lease of the same of the master and fellows for a term of fifty years, the term to commence at a Feast before the making of the lease. And afterwards in 33. H. 8. the college was dissolved by surrender, &c. and then *Fulmerston* purchased the fee-simple and entered upon the lessee, who re-ousted him, whereupon *Fulmerston* brought trespass; and, Whether the second lease be good for all or only for twenty-one years, or void in all, was the question? * And the plea in bar was the lease of fifty years, to which the plaintiff replied, and shewed the former lease and the grant of it to the defendant, and that he took the said new lease *ut supra*: and he pleaded the act of 31. [H. 8. c. 13.] omitting the branch and proviso that makes leases good for twenty-one years, being made within the year to those who had an estate in it before not expired, and concluded that the second lease was void, because the first lease and interest was *in esse*, and continuing, &c. (2) And the other rejoined and pleaded the said proviso, and concluded that his lease was good for twenty-one years at least, which term still continues. And to this the plaintiff demurred in law; and it was well debated at bar and bench; and all the Judges concluded against the plaintiff in their arguments; and yet they all agreed that the pleading of the proviso in the rejoinder was a departure from the bar, for it does not go before the matter of the bar, nor with it, nor does it enforce, &c. However, BROMELEY, Chief Justice, said it deserved consideration. (3) Also the

A lease for fifty years made by a college within one year before stat. 31. H. 8. c. 13. to one who had a former lease still *in esse*, shall be good for twenty-one years, but for no more.

Plow. 102. S. C.

* [103. a.]

Plow. 410.

6. 22. H. 7. 8. b. 25;
Departure, 10.
Br. Departure, 22.

[Bac. Ab. Pleas, L. 2:
Wils. 96. 4. Term
Rep. 504. 585.]
Plow. 109. a.

rent should have been alleged. Also they all understood the statute, that the lease above for fifty years should be good for twenty-one by the proviso, and by the words *only for twenty-one years* is abridged the surplus of the years: and to join the last words to that, *s. so that the same lease or leases exceed not twenty-one years*, is a demonstrative and not a conditional sentence, and shall be understood of the estate that the lessee shall have, and not of the years comprized in the indenture. (4) Also it was argued, that at the time of the second lease the first lease was not *in esse*, or continuance, but was determined; therefore it was good for the entire fifty years by BROMELEY, but PORTMAN held the contrary. Also it was argued, that if the second lease was void by the statute, then the first lease had continuance still; but the said two Justices held clearly to the contrary, for there was an intermediate time between the making of the lease and the surrender, wherefore by the act the lease is made void, but not *ab initio*.

[3. Bac. Ab. 345.]

If seisin be pleaded in the master and fellows of a college, it need not be said in *jure collegii*.

[Doct. Plac. 288. 5. Com. 80. Vin. Ab. Seisin (K.)]

Plow. 102. 105. 24. H. 8. Feoffments al Uses, 40. 22. Aff. 30.

(5) Also several exceptions were moved to the pleading of the replication: first, Because it was pleaded that such a master and fellows were seised in their demesne as of fee, without saying *in right of their college*: and secondly, That the king by reason of the surrender of the college and of the act became seised, &c. in right of his crown: and neither the one nor the other allowed; for by the first it cannot be intended of seisin in them in any other manner, &c.: also because the words of the statute are *to hold to the king, his heirs, and successors*, he is seised in right of his crown.

Ante, 86. a

(6) Also there was a notable exception to the pleading upon an exception in the first lease of a tenement late *Largiant's*, because the plaintiff did not take an averment *that it was not parcel of the one hundred acres of pasture in which the trespass was supposed*; and hereupon this case was mentioned: A man seised of a manor * made a lease of it for years, except one acre. BROMELEY thought now that this acre is not parcel of the manor, but severed from it, and become in gross; as of an advowson excepted where the entire manor is leased, the advowson is become in gross by 38. Hen. 6. [38. a.] so that if the manor be recovered against the lessor, this acre excepted is not recovered, &c. But PORTMAN held the contrary; and took a diversity between a lease of a manor for life with the exception afore-

said,

5. Co. 11. Plow. 104.

* [103. b.]

[Cro. Eliz. 522. Shep. Touch. 76. Jenk. cent. 7. pl. 91. 2. Term Rep. 415.]

11. Co. 50. a. 36. H. 6. 20. a. Br. Comprise, 28. Grants, 60. 18. Aff. 2. 18. E. 3. 38. Dier, 187. a. 349. b. 350. a.

said, and a lease for years: for the case of the lease of a jointenant of his moiety for life, or for years, proves a difference between them.

(7) Also it was moved, Whether where a man pleads an act, he ought to plead the whole act? And all the Judges thought that he need not, nor was it ever usual to allege any more than the part of the act which serves his purpose, and no more, &c. Also it was holden by BROMELEY, that this act ought to be certified *sub pede sigilli*, because it is a private act: but *quære* this, for he did not much insist upon it, and no one ever held so before.

A party need not recite more of a statute than is necessary to support his own case.

Plow. 65. b. 105. 483.
[T. Jones, 50. 4. Bac.
Ab. 656. Cro. Eliz.
139.]
10. H. 7. 9. a. Pl. 410.
b. 1. 7. Co. 78. 10.

Lastly, it was moved that the deed inrolled of the surrender of the college to the king ought to be shewn. *Sed non allocatur*, because the act vests it in the king, &c.

[Plow. 105.]

Lord Windfor against St. John and Wife.

(8) NOTE, in the writ of right of *Lord Windfor* against *St. John* and his wife, the *petit cape* was returned on the octave of *St. Michael*, and the wife came in proper person, and prayed to be received: and GAWDY took a challenge that the demandant ought to be nonsuited, because neither he nor his attorney offered themselves in court at the first day, *s.* on the essoin day, as he ought by law in a writ of right, according to 42. E. 3. fol. 12. [15. b. pl. 28.] And BROWNE, *Justice*, recorded, that neither the demandant nor his attorney were in court on the first of the four days. But there seems a difference between this case and where the issue is joined by battel or grand assize, for there the demandant must offer himself at the next day, and repeat the words, &c. and his offer ought to be entered on the roll; but here the tenant had made default before; wherefore, &c.

(9) And also the tenant did not cause the demandant to be called the first day, for he was then not there, &c. and then the demandant cannot be nonsuited, &c. And the wife afterwards made answer and vouched to warranty; see of the receipt accordingly E. 4. E. 3. 15. and then she waived the voucher, and joined the wife upon the grand assize.

In a writ of right, if the tenant make default on the essoin day, the demandant cannot be nonsuited.

5. Co. 86. Supra, 98.
a. 12. E. 2. Judgment
235. 12. H. 7. 12.
2. Rol. Ab. 440.
33. H. 6. 45. 46. N.B.
5. N. Dyer, 56. a. 247.
12. H. 7. 10. 12. H.
8. 8
1. Bulst. 159.

[Booth. Real Act. 68.]

2. Rol. Ab. 445.
Plow 13 b. 21. f. 6. 48.
3. H. 4. 18. Dier, 298.
22. E. 3. 18.

And on the summons of the four knights being returned, they appeared girt with swords above their garments: and one of them was challenged there in bank, *s.* Sir George

One of the four knights challenged in bank and drawn, an *ad summons* awarded for another,

and *habeas corpora* of the residue.

[Bendl. 42.]

Anon. Ben. 7. } S. C.
Mo. 3.

[Booth. Real Act. 97.]

Pawlet, because he had married the daughter of the defendant; and for this cause he was drawn, and a new summons awarded * to summon another, and an *habeas corpora* for the rest: and all this was done. And there were other challenges for favour in bank before the Justices. And with this agree 17. H. 8. Rot.—which is contrary to 15. E. 4. [1. pl. 1.] and 7. and 39. E. 3. [2. b.]

Anderson and Others against Warde—in Error.

A recovery in *dum fuit infra etatem* against an infant by default after default may be reversed for his nonage.

And he may assign the nonage for error without averring that he had the land by descent.

Co. Litt. 380. b. 3.

Co. 13. B. N. C. 1.

19. E. 3. Infant, 10.

Cro. Jac. 465. 2. Rol.

Ab. 755. R. 761.

Palm. 231. Dier, 129.

2. 11. E. 4. 1. 21.

E. 3. 2. N. B. 35.

M. 6. Co. 4. Post.

137 a. Gouldsb. 181.

1. Keble, 797. 893.

6. H. 8. 8. Br. Saver

Default, 50. 2. M. Br.

Judgment, 147. 179.

26. Aff. 6. 33. H. 6.

9. 40. E. 3. 10. 25.

21. H. 7. 40. 2. Rol.

Ab. 572. 1. Inf. 380.

b. 1. Rol. Ab. 805.

(10) A MAN recovered by *dum fuit infra etatem* against three by default after default, and two of the tenants were within age: and they all brought a writ of error, and assigned the nonage for error; and it appeared to the Court that they were within age upon inspection. And note the assignment of the error was, that at the time of the rendition of the said judgment they were within the age of twenty-one years, without alleging in fact that their ancestor was seized and died seized, and that the land descended to them, &c. so that it might appear that there was cause to have had the first parol demur during the nonages. And for this reason the assignment was challenged. *Sed non allocatur*; for there was a notable precedent and record shewn by HAYWOOD, s. in E. 6. H. 8. before FINEUX, &c. Rot. 22. [Benloe 11. pl. 7.] that a writ of error was brought by one *Carryon* upon a judgment given in C. B. against him by default after default in a formedon in the reverter, and he assigned the nonage as above generally, and the defendant averred him of full age, without this, that he was within age, and issue joined. And this issue was tried there by the inspection of the Court, and adjudged within age, and thereupon judgment given for the plaintiff, s. “for the aforesaid error let the said judgment be reversed, &c.” without saying “and others in the record,” because the error was an error in fact, and not in the record. So note the difference in the entry, by HAYWOOD. See for the default of an infant, M. 7. E. 3. 4. [47.] and 7. T. 13. E. 3. 12. And

(10) 6. Jac. C. B. Recovery of dower against an infant by default shall not be avoided by nonage. And 17. E. 2. Fitz. Tit. Saver Default. 80. In dower an infant ought to save his default, and *Smith v. Smith* accord. M. 3. Jac. B. R. [Cro. Jac. 111.] by judgment.

quare legem, Whether the outlawry of an infant be erroneous or not? And note, that all the three were adjudged *per Cur'* to be within age at the time, &c. And therefore the defendant, in *Easter Term*, 1. and 2 *Philip and Mary*, demurred in law upon the above assignment of error, and did not rejoin, *s. in nullo est erratum*, and this was the better way by the opinion of the Court. And HAYWOOD, *à contra*. And in *Michaelmas Term*, 2. and 3. *Ph. and M.* it was again argued as follows. (11) It appeared that the *dum fuit infra ætatem* was brought by *Warde* against the three sisters, as daughters and co-heiresses of *John Anderson*, and so they were named in the writ of *dum fuit infra ætatem*. Therefore *quare*, Whether it be necessary to aver in the assignment of the error, that their father died seised in fee, and that the land descended to them being within age, or not? for there is no supposal of the writ that they have entered except by their father. * *Ideo quære inde*. It seems in the first place, that every subject of this realm, for injuries done to him in his goods, lands, or person, may sue to the king, and against any subject, be he bond or free, woman or infant, religious, outlawed, excommunicated, or otherwise, without any exception, and against him who is able to render the demand, &c. And the king sitting in person in chancery says, "*nulli vendemus, nulli negabimus, aut differemus iudicium aut remedium*," as *Magna Charta* says [c. 29.]: then the sheriff is the officer to serve the process, if it be real to summon the tenant upon the land, and if he return him an infant, or *feme covert*, the return is bad; but to return that the abbot who is sued by the name of *I. Abbot* is deposed, is allowed in 1. *H. 6.* 2. pl. 6. for a good return, because it amounts to death, &c. (12) An infant is impleadable by law, and for his contumacy or contempt shall be punished as a man of full age; as an outlawry returned upon an infant is good, and not error, by 2. [3.] *H. 5.* [Fitz. Tit. Utlagarie, 11.] so that he be past fourteen [twelve] years. Such also is the law upon default after default.

And in *M. 30. H. 8. Rot. 523.* final judgment was given in a writ of right *quia dominus remisit curiam suam*, &c. brought by MARVYNE, *Justice*, and others against

7. H. 4. 5. a. 7. El.
239. a. 7. 38. E. 3.
44. 16. 13. E. 1. In-
fant, 16. 2. E. 2. Age,
78. 2. 5. E. 3. Age,
80. 2. Rol. Abr. 805.
Dier, 65. b. 3. H. 5.
Utlary, 11. 7. E. 4.
16. 26. B. N. C. 30.

* [104. b.]

6. 15. E. 4. 4. 1. 14.
H. 8. 16. 35. H. 6.
11.

2. Inst. 269.

2. E. 3. 41. 2. H. 7.
10.

2. Rol. Abr. 805.
2. H. 6. 5. Co. Litt.
172. 26. Aff. 9. Dier,
137. 239. a. 8. E. 3.
19. 3. 8. E. 3. 5.
Fit. Utlary, 14. 28.
E. 3. Stath. Utlary,
8. 14.

[*Marvin et Al' v. York.*]

6. Co. 37. Dier, 56. a.
31. H. 8. Rot. 316.
3. Cro. 158. R. 399.

Mich. 33. and 34. Eliz. Error in *B. R. Rot. 532.* [Cro. Eliz. 516.] *Truff. l's case*, who in debt against him pleaded that he was outlawed for felony, and adjudged no plea. See the record. [Folt. 61. 1. Hen. Bl. Rep. 129.]

28 E. 3. 99. b.

[3. Com. Dig. 140.
Booth Real Act. Lib. 1.
cap. 20, 21.]

16. Jac. Cro. 467. 4.
Estrepeinent, 4. 3.
H. 7. 12. Stamf. 16.
7. Co. 27. 12. Aff. 30.
Dr. and Stu. fo. 67.
213. 29. Br. Cover-
ture, 68. 6. 9. Co.
4. b. 85.
[Folt. 70. 1. Hawk.
3.]
14. E. 3. Saver Default,
78. 37. Aff. 5. 5. E. 3.
Surety, 6. 4. 12. H. 7.
15. 10. 10. 20. E. 4.
10. 17. 4. 26. 32. E. 3.
43. 63. 7. 12. H. 4.
28. 29. E. 4. 5. b. 33.
H. 6. 6. a. 8. H. 6. b.
Contra, 4. 41. 44. 48.
50. E. 3. 51. 10. 33.
70.

2. Inf. 375. Plow.
369. b.

Margaret York, being tenant for life, remainder to the two daughters of *Ernely* her first husband in fee; and the mother prayed aid of them shewing this matter, and they joined *gratis* by a guardian there present, admitted by the Court; and then all three joined the *mise*, and then made default, being solemnly called, and departed in contempt of the Court, and made default; wherefore final judgment was given without any voucher against them all, &c. (13) *Also*, 9. E. 4. [34. b. pl. 10.] final judgment was given against an infant. And 3. H. 6. [16. a. pl. 22.] an infant was driven to answer to the breach of a prohibition in *estrepement*, &c. And 3. H. 7. [1. b. pl. 4.] for felony, because *malitia supplet aetatem*. Also a nonsuit in *quare impedit* in 5. E. 2 [148, 9.] is peremptory for the possessory action, and his sureties shall be amerced: yet *quare* this. And T. 14. E. 3. [Fitz. Tit. Saver Default, 40.] an infant *essoigned pur service le roy* failed of his warranty at the day, and seisin of the land was awarded against him. An infant is bound by every statute law, if he be not expressly exempted as forjuder, recovery in *cessavit*, fines with proclamations. An infant prayed to be received, and there is a traverse; he shall find surety for the mesne profits as a man of full age, 5. E. 3. [22. pl. 11:] An infant plaintiff in assize is favoured, and the Court and Judges will aid him to make his title and plead; otherwise it is if he be defendant in the

(13) Entered *M. 2. Jac. B. R. Rot. 356*. This was assigned for error in the case of *Smith*: but because it did not appear to the Court that he was an infant, it was resolved to be no error. An infant tenant in dower shall not have his age, and if he lose by default he shall not reverse the judgment. [Cro. Jac. 111.]

East. 9. Car. B. R. in Lord Monjoy Earl of Newport's case [Cro. Car. 307. Sir W. Jones, 318.] in a writ of error on a judgment given in *C. B.* it was resolved by the whole Court, that when an infant by his guardian levies a fine, and recovery is had against him accordingly, he shall not avoid it when he comes of age. [See Co. Litt. 380. b. (note 1.) and Cruise on Recov. 145. 148.]

M. 2. Car. B. R. Delaval and Clare's case [Noy, 85. Latch. 156. Sir W. Jones, 146.]. An action upon the case was brought against an infant, for that whereas he sent cloth to the plaintiff being a taylor to make him a suit, &c. and promised to give him as much, &c. and adjudged that the action lies. So *Blackstone's Case*, *M. 7. Jac. B. R. Rot. 1574*. [reported in *Delaval v. Clare*, in Noy, &c. *supra*.] A brewer of London brought an action upon the case against an infant for drink sold to him for such a price, and the action was adjudged maintainable. If an infant be bound in a penal bond, this is bad, although it be for eating and drinking, which was *Hutchings's case* [stated in *Delaval v. Clare*, in Latch, *supra*].

T. 16. Jac. B. R. *Hill and Wittington's case* [Cro. Jac. 404.]. An infant, being a merchant, buys merchandize; and, Whether he shall be charged by his contract? was the question. And by *BROMELEY, Baron*, being a Judge of the corporation, it was adjudged he should. Whereupon error was brought, and the judgment held erroneous by *MOUNTAGUE, CROOK*, and *HOUGHTON*, for an infant shall not be bound by his contract, unless it be for his meat and drink, and for necessary apparel, and what shall be adjudged necessary is in the discretion of the Court. [See Bul. Ni. Pr. 154, 155. 1. Term Rep. 40. 2. Term Rep. 150. 1. Br. Cas. in Ch. 106. 152. 484. 3. Com. Dig. 165.]

affize.

affize. And although by 3. *H.* 6. [10. a. pl. 12.] if an infant appear at the *grand cape* he shall not save his default, &c. yet the judgment upon his default is not erroneous, Cro. Jac. 468.

because it is *voluntariè se absentavit*, and then he sues to have the favour of that law which he has despised, and he who resists the law shall ask its aid in vain. (14) Also in 5. *E.* 3. East. 32. and *H.* 34. *E.* 3. the tenant in a formedon being an infant appeared by * guardian, and prayed his age: and the demandant averred him of full age, and prayed that he might be inspected, &c. And at the day he made default, a *grand* or *petit cape* shall issue, but *quære* which of them. Cro. 51. + Plow. 364. a. Dr. and Stu. 142.

Also the great inconvenience is to be considered; for if he shall reverse this judgment, then there is no remedy to recover lands against an infant during his nonage, for he will make default after default in all actions, &c. And although the precedent of 6. *H.* 8. is against the defendant, yet see *Long Quinto E.* 4. fol. 112. [110. a.] that precedents [* 105. a.] and usage do not rule the law, but the law them. Bro. Saver Default, 5.

And therefore it was there said, that an outlawry was reversed because it was *ad com' Lancastrie ibidem tent'*, and did not say at *Lancaster* or such certain place whereto the "*ibidem*" might be referred; and yet it was reversed, notwithstanding there were one hundred precedents of such returns; then *a fortiori* of one precedent, because one swallow doth not make a summer. And see a case of privilege in 2. *H.* 7. fol. 2. a. (in the new report) denied to one who did not come personally into court, so that he might be examined whether his intent was to come to *London* for his matter in suit, or not. But notwithstanding all these reasons, the judgment was afterwards reversed. 2. R. 3. 7.

6. 11. *H.* 7. 15. b. 10. Cro. 199.

4. Co. 94. b. 95. a. Dyer, 69. a.

Br. Privilege, 34.

Bonham, Knight, against Lord Sturton.

(15) **JOHN BONHAM**, Knight, brought an action upon the case against *Lord Sturton* in the county of *Wilts* for slander. And *Lord S.* justified the words in a certain

In slander the defendant justified, and verdict for the plaintiff; the Court cannot mitigate the damages, but in a case of mayhem may encrease them.

(15) A writ of inquiry of damages was awarded, and the Judges abridged them, but this is only an inquest of office; but otherwise is it if the jury at first had given such damages, yet there the Judges may abridge the costs. 19. *H.* 6. 42. 3. pl. 86. 29. and 30. *Eliz. B. R. + Thorngate v. Reeve*, if in debt on bond, &c. the jury give no damages, the Court may assess damages, because the debt is certain, and the plaintiff's loss apparent.

2. 3. H. 6. 1. 30. Ass. 15.
3. Leon. 150. 1. Sid. 108.
433. 12. E. 3. Judg-
ment, 161. B.N.C. 238.
3. H. 4. 4. Damages, 54.
14. H. 4. 9. b. 19. H. 6.
10. Damages, 24.
[Gooding. Bankr. 173.
Palm. 314.]
19. H. 6. 43. 8. H. 4.

certain manner, and the plaintiff replied *de son tort demesne* without such cause; whereupon issue was joined, and found by *nisi prius* for the plaintiff, and damages assessed at five hundred marks; and it was moved, Whether the justices may mitigate the damages, or not? And it was adjudged that they could not, because the damages are the principal (a).

23. Damages, 57. B. N. C. 166. 27. H. 8. 2. b.

TRIPCONY'S CASE.

[Jenk. Cent. 2. c. 29.]
11. H. 4. 10. 39. E. 3.
20. b. Damages, 65.
22. E. 4. 11,
Rol. Contin. 244. 1.
Rol. Abr. 572. 3.
H. 4. 5. 2. 11. H. 4.
65. b. 8. H. 4. 22. a.
30. Ass. 30. 22. E. 3.
11. b. Damages, 105.

But in *B. R.* in this Term in the case of *Tripcony*, the jury at *nisi prius* gave him only forty pounds for the cutting off of his right hand, and this was increased by the Judges to one hundred pounds. But this was a matter apparent to the Court, and the offence and trespass was carried about with the person: but note, that the action of battery made also express mention of the cutting off of the hand. And the defendant justified by *son assault demesne*, and in defence of himself, and this was found against him, &c.

Damages increased by the Court in trespass, *E. 7. H. 4. [31.] B. R. Rot. 41. And M. 9. H. 4. B. R. Rot. 33. And H. 12. H. 4. B. R. Rot. 9. So adjudged H. 16. E. 3. B. R. Rot. 2. & John de Mompelas v. Gilbert de la Main, and John de Darber in Maybem. And T. 13. E. 3. B. R. Rot. 27. & John Castellins v. Thomas Chaworth, damages increased in Maybem two hundred pounds more by the Judges. And M. 4. H. 4. Rot. 68. & Rich. Heyter for the loss of an eye. E. 8. H. 6. Rot. 16. & Simon Framph for two fingers.*

E. 43. Eliz. B. R. & Tong v. Formaby, in an action for conversion the Court was moved to increase the damages, and would not. *Aliter* if it had been of money, the value of which is known to the Court; or of *Maybem*, where the Court may see the hurt. Sayer Damages, 177.]

(a) It is now usual to grant a new trial where such damages are manifestly outrageous and extravagant; yet the Court will not do this without very strong grounds. 2. Black. Rep. 942. 1327. 2. Willf. 205. Cowp. 230. 1. Term Rep. 277. But for the smallness of damages the Court refused

to set aside the verdict. Barnes, 445. Cal. of Pract. C. B. 104. Still, however, in case of trespass for assault and battery (as in *Tripcony's* case here) damages may be increased upon the view. Sayer Damages, 173. 193. Barnes, 153. 1. Willf. 5.

Eliz. Pinde against Norton, in Error.

A mistake of the recoverer's christian name in the warrant of attorney to suffer a common recovery, is amendable after error brought. Whether by a writ of error "of a plea which

(16) A COMMON recovery was suffered in a writ of entry in the *post* against the said *Elizabeth* with intent to defeat an entail: and the warrant of attorney was, *Alicia Pinde puts in her place M. B. &c. against Norton*, when in truth her name was *Elizabeth*; and this matter

(16) *T. 3. Jac. B. R. [1. Roll. Ab. 199. Cro. Jac. 89.]* Error brought by *Sir Francis Knowles* upon a judgment given in trespass, the error was that the *venire facias*, and not the *babas corpora*, was sued in the time of queen *Elizabeth*, and the *distingas* supposed a summons "into our court," when it was by *venire facias* in the time of queen *Elizabeth*. [2. Hawk. Pl. C. 429.]

was assigned for error, s. that no warrant of attorney was entered of record for the said *Elizabeth*; and, Whether this be error, or only a mistake amendable, or not? *quare*. See statute 8. H. 6. * c. 12. Also see *M.* 14. H. 7. [11. pl. 21.] the like in affize. And note in the case above, in fact the record in *C. B.* of the warrant of attorney was amended after it was removed by writ of error. And when the error was assigned as above, the defendant pleaded that there was a variance between the certificate and the writing in the bench, and shewed the statute 8. H. 6. c. 12. of this case; and *quare* the mode of this pleading, and the certificate of it. And note, that the original writ of error was of a plea which was *in our court*, and *before our Justices*, and *by our writ*, between the parties, &c. and the judgment and the record were given and entered 37. H. 8. and the writ of error brought in 1. E. 6.; and for this it was moved, Whether the record was well removed into *B. R.* or whether it should always remain in *C. B.*? And see *E.* 9. H. 6. [4. b. pl. 8.] thereof in debt, by FAWKENER. See also 2. R. 3. [2. b. pl. 7.] in error, by COLLINS, &c. and *M.* 3. and 4. *Eliz.* fol. [206. b. pl. 12.]

"*was in our court*," when the judgment was of a former reign, the record is removed.

1. Rol. Ab. 289. 1. Rol. Rep. 16. 34. H. 8. B. N. C. 43. 2. Bull. 169. 14. H. 7. 11. Bro. Amendment, 43. 5. Co. 44. [1. Wood's Con. 673. Cruise Recoveries, 182. Dougl. 114.]

Raft. Amendment, 3. 37. H. 6. 2. b. 12. Bro. Error, 5.

1. Sid. 104.

[2. Mod. 247. 2. Bat. Ab. 200, 201.]

Dyer, 3. 56. b.

Fleier and Wife against Southcot. B. R.

(17) A MAN indebted in a bond of forty pounds made his wife his executrix, and died; she administered, and proved the will, then married again, and was afterwards divorced by reason of pre-contract made with another by the wife; and she appealed from the sentence to the king according to the statute [25. H. 8. c. 19. §. 4.], pending which appeal the husband intermeddled and administered the goods of the testator, and then the wife died before the appeal was discussed; and administration *de bonis non* was committed to the daughter of the wife; and the obligee brought an action of debt upon the bond against the husband as executor *de son tort* of the will of the obligor. And the question in *B. R.* was, Whether the action lies or not? And it was there moved

A woman executrix appealing from a sentence of divorce for her pre-contract, and dying before judgment; Whether the husband, by administering the testator's goods pending the appeal, be an executor *de son tort*?

35. H. 6. 35. b. 1. Rol. 918. 2. R. 2. Quare Imp. 143. Dy. 240. b. 20. H. 6. 25. b. 10. H. 7. 12. b. 29. E. 3. 16. 27. H. 6. Gard. 113. 13. and 10. H. 6. Executor, 22. 4. Co. 29. 21. H. 6. 8. b. 5. Co. 33. b. 34. a. 6. Co. 18. 26.

(17) NOW, Attorney General, in the Lent readings 1632, held, that if a woman be divorced from her husband *causâ precontractûs* with another *per verba de presenti*, in that case immediately by the sentence given in court, the marriage shall be completed between the said woman and the first husband without any of the rites performed *in facie ecclesiæ* — *scilicet* upon a contract *per verba de futuro*.

H. 8. 7. Administra-
tor, 19. 9. E. 4. 47.
Executor, 37. Wentw.
58. 247. 20. H. 7. 5.
a. 19. 27. 32. H. 6.
7. a. Dy. 245. F.
Administrator, 21.
[2. Term Rep. 97. 597.
Vin. Executor (c. a.).
1. Com. Dig. 264, 265.
2. Bac. Ab. 387. 391.
Godolph. part 2. c. 8.
3. Term Rep. 587.
2. Hen. BL 26.]

as a doubt, Whether, if a man who is not executor or administrator seize the goods of the testator without doing any other act as executor, as by paying or receiving debts or legacies, this seizure alone be not an administration in law, as executor *de son tort demesne*? *Quære inde*, H. 50. E. 3. fol. 8. [9. pl. 18.] and 21. E. 4. [5. a. pl. 12.] and 21. H. 6. [36. a.] See of pleading the above case *postea*, fol. [166. b.]

Sir John Thynne *against* the Earl of Pembroke and Others.

In *quare impedit* it is sufficient for the grantee in fee of the patron to allege a presentment by a prior grantee of the next avoidance.

5. Co. 19.

* [106. a.]

(18) KING Edward VI. was seized of the advowson of the church of *Chedsey*, which was parcel of the possessions of the late countess of *Salisbury* (attainted of treason by parliament in 31. H. 8.) as of fee, and by his letters patent granted the next avoidance, nomination, right of patronage, and free disposal of the said church to two jointly and severally, so that it should be lawful for them * to present *Nicholas Mason* to the ordinary of the place to the said church when first and next it should become void, &c. And at the next avoidance they presented the said *N. M.* who was admitted and instituted; then the king granted the advowson in fee to the duke of *Somerfet*, and he granted it over before his attainder to *Sir John Thynne*; and now the church being void, Whether *Sir J. T.* can make a good title in *quare impedit* to the presentment aforesaid or not, without alleging the presentment in the king, or any other by whom he claims? *quære bene*. And see 9. H. 7. [23. a. pl. 3.] in *quare impedit* by the better opinion (I believe) he may; but there it is a question, Whether the grantee of an advowson in fee ought to shew the first deed of grant of the next avoidance, or not?

2. Rol. Ab. 377. Moor.
456. Dy. 108. b. 42.
43. E. 3. 4. b. 15. a.
13. H. 7. 14. b. 9.
16. H. 7. 16. b. 8.
26. M. 8. 9. 5. Co.
98. a. 57. 8. H. 5.
10. 7. 22. E. 4. 29. a.
9. b. Br. qua. imp.
128.
[Watf. Cler. Law, 249.
Cro. Eliz. 518.
Mal. qu. imp. 155.]

(18) It is void, so adjudged *Trin.* 31. H. 8. Rot. 100. *Sir Godfrey Fulgleame v. Sir William Hollis* (a).

(a) I do not see to what this note should apply. The case cited is, upon a grant of the next avoidance to four, and to each of them jointly and severally, and a presentation by one only of another of the grantees hold-

en good. Mo. 4. An. Ben. 34. 4. Leon. 119. 1. And. 2. Bendl. 24. The words *it is void*, in the original *cest void*, render it unintelligible. This is the point of fol. 304. b. pl. 54. *postea*.

Sir Roger Townsend—*Amy* his wife
died 20. Nov. An. 5. Ed. 6. | died 25. July, An. 5. Ed. 6.

John Townsend
died June 4. An. 35. H. 8.

Richard Townsend—*Catharine* his wife,
died 20. July, An. 5. Ed. 6. | late wife of *Peter Sein* kill.

Roger Townsend,
within age, and in ward of the King.

(19) IT was found by office before *John Spencer*, escheator of *Suffolk*, that *Sir Roger Townsend* and *Amy* his wife were seised of the manor of *Akenham* in the county of *Suffolk* in their demesne as of fee-tail general in right of the said *Amy*. And the said *Sir R.* by deed bearing date July 28, in the 29th year of the reign of *Henry 8.* enfeofed *Sir John Skelton* and others in fee to the use of him the said *Sir R.* and *Amy* his wife for the term of their lives, and after their decease to the use of *J. Townsend*, son and heir apparent of the said *Sir Roger* for life, without impeachment of waste; and after his decease that the said manor should be to the use of *Richard Townsend*, son and heir apparent of the said *J. T.* and *Catharine the wife of the said R. T.* and the heirs of the body of the said *Richard* lawfully begotten; and for default of such issue, to the use of the right heirs of the said *Amy*: by force of which feoffment the said *Roger* and *Amy* were seised of the said manor in * their demesne as of fee-tail in right of the said *Amy*, s. the said *Amy* as in her remitter, and better right. Afterwards *John* died, and then the said *Roger* and *Amy*, by deed indented and sealed, leased the demesnes of the said manor, which were usually demised, &c. to the said *Richard T.* for the term of twenty-one years, reserving to the said *Roger* and *Amy*, and the heirs of the body of the said *Amy*, the accustomed rent. And afterwards *Richard T.* made his will, and made *Thomas Townsend* his executor; then *Amy* died; and last of all the said *Sir Roger* died, *Roger* the son of *Richard* being within age. *Quere*, Whether *Catharine* shall have the manor as above for life? or, Whether *Roger* shall have it, as heir to his great-grandfather and grandmother by the said remitter, as is found in the office? and if it be not adjudged a remitter, then, Whether *Catharine* may enter before the office by which the remitter is found be traversed?

In Cur. Ward.

Where a man seised of lands in right of his wife makes a feoffment to the use of himself and wife for life, the possession which comes back again to the wife by the execution of it to the use by the statute of uses does not work a remitter in her: and though found by office a remitter, that is of no avail.

Plow. 111. a. 114. S. C.
Dy. 54. b. 119. 22.
E. 4. 14.

* [106. b.]

Dy. 23. b. 51. b. 54. a.
34. H. 8. Bro. Remitter, 49.

Where a jury find the facts at large, and further conclude against law, the verdict is good, and the conclusion ill.

[Plow. 114. and see the books cited in the margin there.]

29. H. 8. B. N. C. 119. Plow. 259. 9. Co. 25.

[3. P. Wms. 461.]

(20) And note, that in the conclusion of the office *Roger*, who was under age, was found cousin and heir to *Amy*, s. son of *Richard*, son of *John*, the son of the said *Amy*; so that if *Catharine* were dead, he would clearly be remitted by the common law, although the statute of *Uses*, 27. H. 8. [c. 10.] had never been made. And *non constat* by the office, whether *Catharine* be dead or alive, therefore *quære*, how it shall be taken? And at length, after long arguments in the court of wards before *PORTMAN* and *SAUNDERS*, *Justices*, it was ordered and decreed by their advisement, that this was not a remitter, &c. in this *Michaelmas Term*, 1. and 2. *Pb. and M.* and so the finding of the remitter in the office is holden of no force in law, because it is not the duty of the jurors to judge.

Lease by a prebendary
“with assent of the bishop
“and of the dean and
“chapter, &c.” (without calling the dean by name) and concluding
“in witness whereof the
“parties abovesaid, &c.” the seals of the bishop and chapter being affixed; Whether this shall be a good confirmation to bind the successor? *quæ.*

Dy. 61. 40. a. 83. 86.
Co. Lit. 300. b. 7. H. 7.
15. 7. H. 4. 15. b.
14. H. 6. 17. a. 29.
H. 8. 40. b. 11. H. 7.
9. b. 1. Rol. Ab. 481.
17. E. 3. 1. b. Brief.
663. 12. H. 4. 15. 13.
18. E. 4. 8. b. 8. b.
post. 132. b. 21. H. 7.
7. b. 8. B. N. C. 201.
Lit. pl. 6. 48. [Watf.
Clerg. Law, 424. 3.
Bac. Ab. 390. 1. Bac.
Ab. 503, 504.]

Champion's Case.

(21) ONE *Champion*, prebendary of the cathedral church of *Chichester*, leased by indenture made between him and one *A. B.* in the 24th year of *Henry 8.* for years, and said in the beginning, that he “with the assent and consent of the reverend father *Robert bishop of Chichester*, “and of the dean and chapter of the same church” (without naming the name of the dean); and the conclusion of the indenture was, “in witness whereof the parties abovesaid “to these present indentures have interchangeably set their “seals, &c.”; and the seal and name of the prebendary, and also the seal and name of the bishop, and also the chapter seal, was affixed to the lease, without any words of confirmation or assent mentioned by them: Whether this lease be good to bind the successor of the prebendary? *quære*, &c.

of the queen, and ought to have escheated to her for default of heirs of the said *Marquis*; therefore the fee-simple was in *consideratione legis*.

Erneleye *against* Walrond.

(83) **T**HE dean and chapter of *Winchester* made a lease of the parsonage of *Albourn* in the county of *Berks*, for a term of thirty years; and afterwards, the said dean and chapter made another lease of the said parsonage to a man and his wife for the term of fifty years, to commence after the end of the said term of thirty years, upon condition, that if the husband and wife should grant over their estate in the said parsonage without license of the said dean and chapter and their successors, that then it should be lawful for the said dean and chapter, and their successors, to re-enter into the said parsonage. The husband and wife, before the end of the first term, grant their estate over without license; the dean and chapter, without any re-entry or claim made, make a new lease for a term of twenty-one years (the said term of thirty years not yet expired) to commence after the end of the said term of thirty years. *Quere*, Whether the second lease be void by the breach of condition aforesaid, or not, because the dean and chapter cannot re-enter during the first lease? Also, Whether the dean and chapter may enter without attorney warranted by their common seal, or not? (a)

A second lease for fifty years, with re-entry for alienation without leave, being made by a dean and chapter, to commence after a prior lease in being: Whether the alienation of the second lessee before the end of the first term, avoids the second lease?

Also, Whether a corporation may enter on their lessee without attorney warranted under their common seal?

a. 2. Co. 94. 53. 1.
22. E. 4. 5. 13. 14. H.
6. 18. Dy. 122. 374.
28. H. 8. 7. a. Plow.
133. b. 5. Aff. 12. 14.
Aff. 11. 19. H. 6. 18.
Bro. Corpor. 28.

[3. Com. Dig. 257.]
1. E. 5. 5. a. 3. H. 7.
17. b. 12. 13. E. 4.
10. 8. 8. H. 7. 16. b.
17. b. 12. H. 7. 29. 27.

(a) A corporation aggregate cannot, without deed, command their bailiff to enter upon their lessee for a condition broken. 1. Roll.

Ab. 514. Cro. Eliz. 815. See 1. Black. Com. 475. 1. Bac. Ab. 507. and the books there cited.

T H E
T A B L E
T O T H E
R E P O R T S
O F T H E
L O R D D Y E R,
L A T E C H I E F J U S T I C E O F T H E C O M M O N B E N C H.

[FROM THE LAST EDITION.]

A.
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b. v. f. 79. p. 47. f. 137. p. 24. f. 104. p. 12. f. 167. p. 41.

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It shall not be granted in *cessavit*, f. 137. p. 25. f. 104. p. 13.

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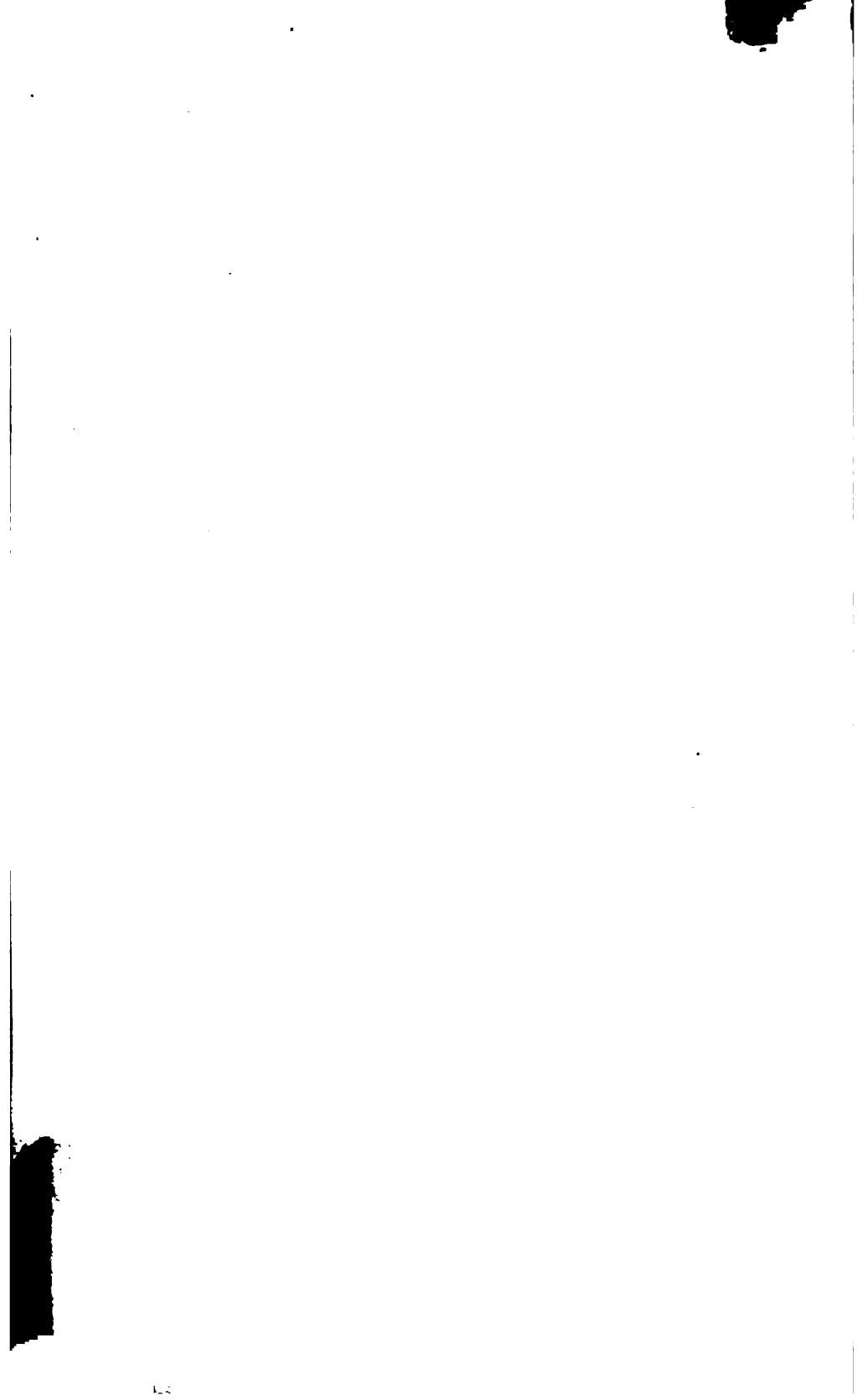
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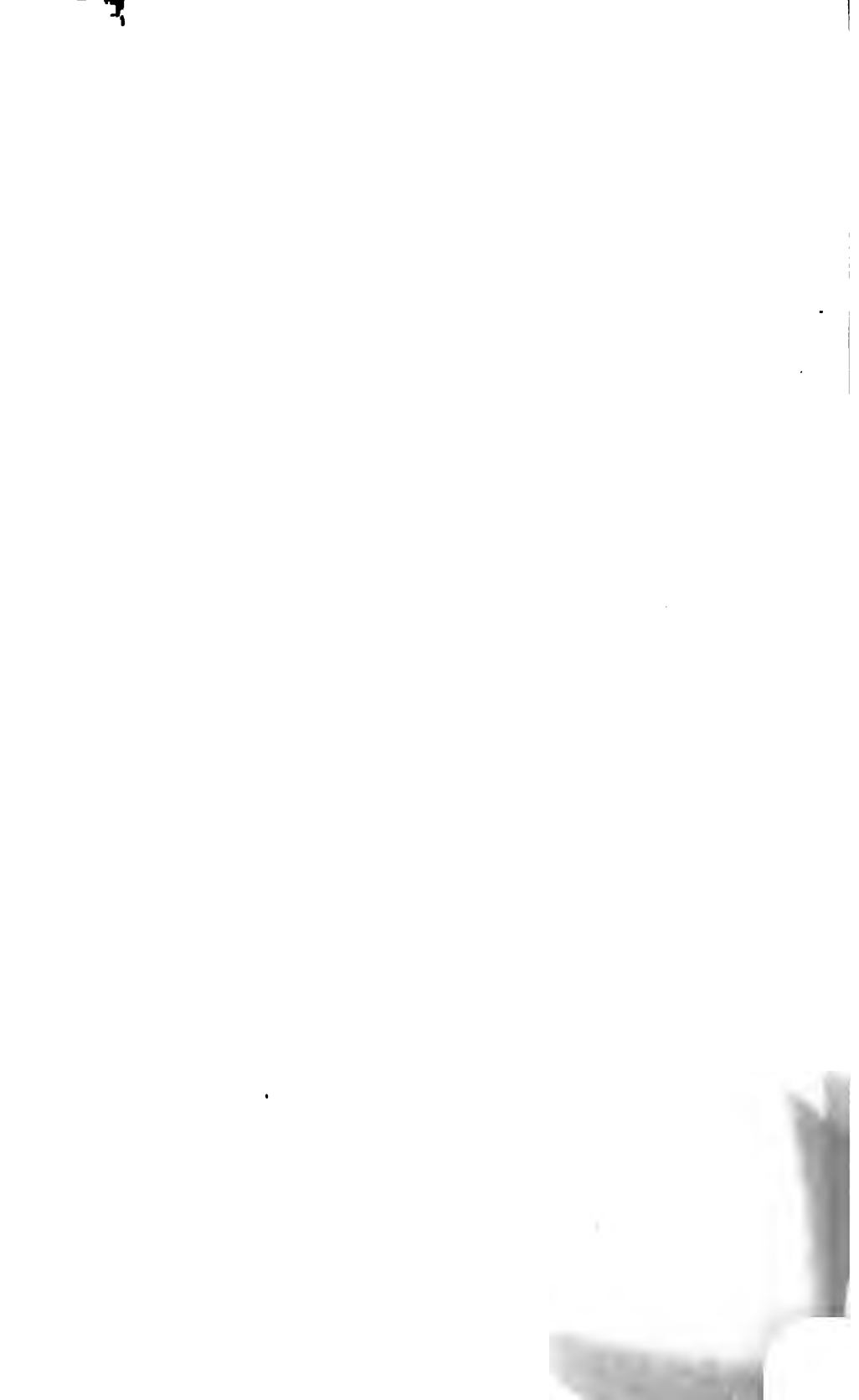
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